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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 701—OCTOBER TERM, 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 713—OCTOBER TERM, 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR APPELLANT AND PETITIONER ON REHEARING

I

DEFENDANTS FAIL TO MEET THE SOUND LEGAL BASIS FOR THE COURT'S DECISION OF JUNE 1956 THAT THE TRIALS HERE INVOLVED HAVE A VALID CONSTITUTIONAL FOUNDATION, APART FROM THE POWER OF CONGRESS TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES

As we have stressed throughout the litigation in this Court, the government believes that the jurisdiction of the tribunals which tried the defendants can be sustained on two independent, although interrelated, constitutional grounds. Defendants' brief, in attacking the basis of the Court's decision last June, argues that the United States can exercise no court-martial jurisdiction over military dependants overseas unless it be contained within the power conferred on Congress by clause 14, section 8, Article I. Before turning to the broad scope of that power as understood at the time the Constitution was adopted and as strengthened by the necessary and proper clause (see Point II, *infra*, pp. 23–61), we would like first to answer, once again, defendants' erroneous attack on the reasoning of the Court's prior decision in these cases. We have already set forth our understanding of the Court's opinion—in our Memorandum in Reply to the Petition for Rehearing (filed in October 1956) as well as at the beginning of our Supplemental Brief on Rehearing (pp. 1–7)—and we respectfully refer the Court to those documents for summary statements which seem to us to show the core of defendants' misapprehension of the opinion. In this brief, we

shall give a somewhat more detailed explanation of the basis of the Court's ruling and of defendants' misunderstandings, as we view them.

The heart of defendants' error is this: Whether a military court is an appropriate one for trying a serviceman's wife overseas—whether it accords due process under all the circumstances—are questions of judgment on which there may be differences of views; but that the United States is without the constitutional power to adjudicate *overseas* the guilt or innocence of an American citizen *committing an offense abroad* is a proposition that must be rejected. But that is the nub of defendants' argument, since they insist on a trial similar to that available to a federal defendant in this country although it is plain that a jury and a grand jury cannot be assembled in a foreign land, nor trial had there in an Article III court. Defendants' entire brief rests on the wholly incorrect assumption that a person accompanying the armed forces into foreign territory, where the United States is not sovereign, is in exactly the same position, constitutionally and practically, as a person accompanying the armed forces within the United States where this nation is wholly sovereign.

A. THE POWER OF THE UNITED STATES TO CONDUCT A TRIAL WITHIN A FOREIGN COUNTRY DERIVES FROM THE SOVEREIGN POWER OF THE UNITED STATES IN ITS DEALINGS WITH OTHER SOVEREIGN COUNTRIES WITH RESPECT TO CONDUCT WITHIN THEIR TERRITORY

Defendants argue at length that the United States was not here exercising powers received by delegation from the governments of Japan and Great Britain (Point I of Defendants' Supp. Br.). We agree, of

course. We have never contended that the United States was exercising powers delegated to it by another government. The powers it is exercising are its own, but the United States cannot exercise its powers without the consent, express or implied, of the foreign government. Nevertheless, the fact that another nation is directly concerned, and also has jurisdiction, has a primary bearing on the scope and context of the powers of the United States.[1] That the United States is not sovereign in the regions where Article 2 (11) applies is a central fact in supporting the constitutionality of that provision. The power of the United States cannot operate in those territories except under the terms upon which it can obtain consent from the foreign country.

In this connection, it is helpful to distinguish between the power which the United States has to do things abroad and the restraints which may be imposed on that power by provisions of the Constitution. There are two facets of the problem. The first is whether the United States has the power to engage in certain categories of conduct abroad, here to engage in the adjudication abroad of the guilt or innocence of certain citizens alleged to have committed offenses abroad. The second issue is whether the Constitution requires that such conduct be done in a certain way, here that these individuals be indicted by a grand jury

[1] In a comparable context, the Court held that "emergency does not create power" but it may "furnish the occasion for the exercise of power." *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425–426.

and tried by a jury before a judge with life-time tenure or, at least, not be tried by court martial.

There surely can be no doubt at this stage in our history of the general power of the United States to regulate the conduct of Americans abroad, to define offenses, and, if the the territorial sovereign consents, to try Americans abroad for such offenses. There is, of course, no provision of the Constitution which says so expressly; but, although the Constitution contains no clause which states specifically that the United States shall have all the sovereign powers of a nation *vis-à-vis* other sovereign nations, it is settled that this is so. See, *e. g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *United States* v. *Pink*, 315 U. S. 203; *Hines* v. *Davidowitz*, 312 U. S. 52; *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103. See also the discussion in the Brief for the United States (pp. 32–35) in *United States* v. *Guy W. Capps, Inc.*, Oct. Term 1954, No. 14.

The concept of the Federal Government as one of specifically delegated powers—to be found in Article I, section 8—applies in the field of internal affairs but not in the area of foreign affairs. See *United States* v. *Curtiss-Wright Corp.*, *supra*, at 315–318;

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[2] In the *Curtiss-Wright* case, the Court pointed out (299 U. S. at 318):

"* * * The power to acquire territory by discovery and occupation (*Jones* v. *United States*, 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 *et seq.*), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co.* v. *United States*, 224 U. S. 583, 600–601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note

United States v. *Pink*, *supra*, at 242 (Frankfurter J., concurring); and see *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, concurring opinions of Justices Frankfurter and Jackson, at 610, and 635–636, fn. 2). As between the citizens and States on one hand and the Federal government on the other, rights not given to the Federal government are reserved to the people and to the States. But as between the United States and other sovereign countries the United States has assumed "among the powers of the earth, the separate and equal station" referred to in the Declaration of Independence, with full power to do all "Acts and Things which Independent States may of right do." "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." *Burnet* v. *Brooks*, 288 U. S. 378, 396.

Inherent in the powers of a sovereign nation is the general capacity to exercise jurisdiction in foreign territory. Clearly, the United States could, if agreeable to the other governments concerned, adjudicate a dispute among nations, or decide a controversy as to ownership of foreign territory, or arbitrate a dispute between individuals. There is no less power—to be exercised if the territorial sovereign consents—to decide controversies among its own citizens abroad, or to exercise criminal jurisdiction abroad over its own nationals who have committed offenses there. The

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1), *none of which is expressly affirmed by the Constitution*, nevertheless exist as inherently inseparable from the conception of nationality." [Emphasis added.]

long history of the exercise of jurisdiction over Americans by American tribunals overseas is warrant enough, in 1957, for accepting the existence of such a general power in the Federal Government. *E. g., In re Ross*, 140 U. S. 453; *Neely* v. *Henkel*, 180 U. S. 109; *Madsen* v. *Kinsella*, 343 U. S. 341; and see the Government brief on the original argument in No. 701, pp. 61–65; Government reply brief on the original argument, pp. 28–30.

In short, the United States undoubtedly has general power, as a fully sovereign nation, to try Americans abroad for their overseas conduct. We turn, then, to the more valid question of whether such trials must be governed by the requirements of Article III and the Fifth and Sixth Amendments.

B. A UNITED STATES TRIAL WITHIN A FOREIGN COUNTRY FOR AN OFFENSE COMMITTED THERE IS NOT GOVERNED BY THE JURY, GRAND JURY, AND LIFE-TENURE REQUIREMENTS OF ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS

1. Only some of the specific provisions of the Constitution are applicable abroad and the requirements of an Article III court and jury trial do not so apply

Defendants appear to argue that every provision of the Constitution is applicable throughout the world, and that the same restraints apply to the United States abroad, where it must adjust its conduct to meet the circumstances that there exist and the views of other governments, as apply in the United States. We submit that (as the Court has already held, *e. g., Dorr* v. *United States*, 195 U. S. 138, 142–3, 148) this is clearly not so.

The provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without due process of law is a broad but flexible restraint upon the power of the United States. It is adaptable to changing circumstances and conditions. The process of law that may be due under one set of circumstances may not be required under other circumstances and may not be adequate under still others. So far as Americans are concerned, this provision is binding upon the United States wherever it exercises its sovereign powers precisely because it "is not a technical conception with a fixed content unrelated to time, place and circumstances", but is rather "a delicate process of adjustment" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162–163 (Frankfurter J., concurring)). By its very nature the Due Process Clause cannot unduly interfere with the exercise of powers by the United States in the international field, or impose an undue restraint upon it.

There are, on the other hand, constitutional provisions which do not automatically apply outside of the United States. The grand and petit jury clauses, as well as the requirement of an Article III court, historically fall into this class, as this Court has consistently held for many years. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Balzac* v. *Porto Rico*, 258 U. S. 298; *In re Ross*, 140 U. S. 453; cf. *Neely* v. *Henkel*, 180 U. S. 109. As recently as the 1951 Term, in *Madsen* v. *Kinsella*, 343

U. S. 341, dealing with American military government courts in Germany after World War II, the Court recognized that neither Article III nor the jury provisions of the Fifth and Sixth Amendments applied to the trial of an American civilian on foreign soil.

Although the Court made clear that it was holding unequivocally that the jury and Article III provisions do not apply, of their own force, to the overseas possessions (see *e.g.*, 258 U. S. at 304–5), defendants endeavor to distinguish the first three of these cases—those arising in the territories—on two special grounds. First, that the trials were before tribunals which were in existence before the territory or possession passed under American sovereignty, and secondly that neither the grand jury or petit jury had formed part of the possession's ancient institutions. Neither distinction helps defendants; rather, each goes to prove that the constitutional provisions for a grand and petit jury do not automatically apply outside the United States, but that one must look to the particular circumstances to see what procedure would be reasonable under the circumstances for a trial in that area, *i. e.*, what would be "due process." In those cases the Court did look to the particular circumstances in applying the due process test. Defendants themselves agree that "There was every reason to hold that the Constitution did not, *ex proprio vigore* and without Congressional action * * *" (Def. Supp. Br., p. 94) require in Hawaii a system of grand juries and unanimous ver-

dicts of petit juries.[3] In short, it is settled by these overseas-possessions cases that the provisions of Article III and the jury clauses of the Fifth and Sixth Amendments do not apply outside the United States.[4]

In re Ross is also a clear holding that the requirements of Article III and the jury provisions of the Fifth and Sixth Amendments do not automatically apply where the United States conducts a trial outside of the United States and within the territory of a foreign government. We have already discussed the *Ross* case, and its implications, in some detail. See the Government's original brief in No. 701 at pp. 61, *et seq.*; Government Reply Brief on original argument, pp. 28–30; Government's Memorandum in Reply to Petition for Rehearing; and Government's Supplemental Brief on Rehearing, pp. 3–4, 81, 90–91. However, in view of the defendants' curious treatment

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[3] It may be well to point out that the defendants, in supporting the reasonableness of the holding that juries were not required in Hawaii and the Philippines, have considered the ability of the United States to conduct a trial, *in those islands*, with grand jury, petit jury, and life-tenure judge. The fact that it would have been physically possible to bring an Hawaiian to the United States and accord him a jury trial on the mainland was not taken into account, and it is quite significant that defendants do not suggest that it should have been. Nevertheless, defendants insist that that must be done in cases like the present.

[4] It was common ground, in these "territorial" cases, that if the overseas possessions did *not* form part of the United States—*i. e.*, if they were foreign territory—the jury provisions of the Constitution did not apply. The controversy centered on the issue of whether these possessions had become sufficiently integrated into the United States to require the use of grand and petit juries. The decisions are, therefore, *a fortiori* authority for American tribunals on completely foreign soil.

of that decision (Def. Supp. Br., pp. 63 *et seq.*), *Ross* requires renewed consideration.

2. *Under the defendants' own theory of the Ross decision, their cases were impliedly excepted from the constitutional guaranty of a jury trial and an Article III tribunal*

Although defendants disavow the concession which the Court understood them to have made during the first argument that they could validly have been tried by a consular court, they do not even now contend that the decision in *In re Ross* was wrong. They argue, however, that the power of the United States to try an American abroad without a jury has somehow faded away with the passing of the consular courts, and that in any case the principles of *Ross* must be confined strictly to consular tribunals in the strict sense.

We emphasize that both the government and the defendants start from the proposition that at the time the Constitution was adopted (and thereafter) American citizens could be tried abroad by the United States without a jury trial. Defendants say on this point:

> It is therefore plain that the consular jurisdiction is a pre-constitutional jurisdiction, established under the Articles of Confederation, and that, prior to 1789, American citizens abroad in countries granting a general extraterritoriality to the United States did not have a right to trial by jury before an American consul. [Def. Supp. Br., p. 70]
>
> * * * * *

> All such individuals subject to non-jury trials when the Constitution was adopted were impliedly excepted from the Sixth Amendment's guarantees. [Def. Supp. Br., p. 90]

This so-called "pre-constitutional" exception defendants seek to limit (a) to trials within countries in which the United States had complete extraterritoriality and (b) to trials by a consul. There is neither logic nor authority for such a limitation.

(*a*). Certainly, the extent of the extraterritorial rights acquired by the United States from a foreign government—whether complete extraterritoriality or a lesser right—cannot be the justification for an overseas trial without a jury. Defendants are here arguing the exact opposite of the position urged at the outset of their supplemental brief, *i. e.*, that a foreign government cannot give the United States rights to try an American without a jury which it would otherwise not have. In the 19th century the United States had full extraterritoriality in many countries. Now, it has limited rights by virtue of the various status of forces agreements. But the applicability of Article III and the jury provisions of the Constitution cannot depend upon that general change in our relations with the nations of the world. If the right of the United States to try an American without a jury cannot be augmented by a granting of rights from a foreign government, it cannot be reduced by limitations on the "extraterritorial" rights allowed by that government.

In fact, exactly the opposite conclusion should be reached. At the time of *In re Ross*, the United States

had much greater freedom of action than it does now with respect to many countries such as Japan, China, Siam, and areas in Africa. It could have taken Ross to the United States for trial, freely and without question. Now, because of the abolition of the old extraterritorial rights, and the change in international relationships, the United States is far less free to do as it pleases, and must negotiate with other sovereign governments for terms acceptable to them. The United States cannot remove persons such as the defendants without the permission of the local government, and if it is to try them abroad it must do so in the kind of tribunal which that government is willing to have sit within its country. In sum, there is absolutely no reason to limit the principle of *In re Ross* to countries in which the United States had "complete extraterritorial rights" or "general extraterritoriality". The only requirement is that the United States be given enough rights so that it may try its citizens abroad with due process. It cannot be the law that the greater the rights which the United States is given by the foreign sovereign the fewer the rights it must give its own citizens.

(*b*). The second limitation which defendants seek to place on *In re Ross* is that it is restricted to trials by a consul because that particular mode of overseas trial was recognized before 1789 and therefore excepted from the jury and Article III requirements of the Constitution. (Def. Supp. Br., p. 70). But what was impliedly excepted from the constitutional provisions was not the exact form of the then overseas trial, frozen rigidly as it was in 1789—the precise type of

consular court with its then procedure practice, and operations—but rather the general concept, recognized under the Confederation, that by arrangement with foreign governments Americans might be tried abroad (for crimes committed abroad) by appropriate American tribunals which do not have to meet the requirements of Article III and the jury provisions. Surely, the United States was not saddled by the Constitution with the minimal standards of the consular court as it was known in 1789, and left without constitutional power to improve or modify that system of overseas tribunals. If it is constitutional for the United States to try a man in a foreign country without a jury before a consul, it must be constitutional to try him without a jury before a tribunal which affords him greater protection. See the government's reply brief on the original argument, pp. 28–30.* Under defendant's own theory, therefore, they are in no position to claim the protection of Article III and the jury requirements.

(*c*). Defendants throughout their supplemental brief on rehearing argue that what is here involved is an "extension" of court-martial jurisdiction which "would contract their right to jury trial as it existed at and before adoption of the Constitution" (p. 101; see also, *e. g.*, p. 51). Even apart from the

* The difference between the *Ross* type of consular court and the present protections afforded the accused in the court-martial system are suggested at the cited pages of our reply brief on the original argument. Defendants' Supplemental Brief on Rehearing gives further examples of consular court practice which compare very unfavorably with court-martial protections.

pre-constitutional use of courts-martial for service wives (see Point II, *infra*), the defendants' own discussion of *Ross* shows, as we have just pointed out, that this argument is fallacious. When the Constitution was adopted, Americans committing crimes abroad were *not* entitled to a jury trial if they were tried abroad. There is no historical evidence to the contrary. It follows that such a trial by a tribunal which does not employ a jury cannot be a "contraction of the right to trial by jury" (Def. Supp. Br., p. 51).*

(*d*): There is no warrant at this time for upsetting the almost seventy years of the Court's decisions (see *supra*, pp. 7–10) holding that the constitutional provisions for juries and Article III courts do not apply to American trials overseas—and defendants do not

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* Defendants purport to find an irreconcilable conflict between *Toth* v. *Quarles*, 350 U. S. 11, and the Court's decision of last June. Both the Court and our previous briefs have pointed out the controlling distinctions—particularly, the fact that Toth was a civilian *in the United States* when taken into custody, and therefore privileged under the Constitution to a jury trial by an Article III court. See 351 U. S. at 474, 476; our brief in No. 701 on the original hearing, at pp. 45–6, 71–2; and our reply brief on the original argument, at pp. 19, 24.

Mainly for this reason—that Toth's trial by court-martial would actually be a "contraction of the right to trial by jury" while the defendants' trial was not—the *Toth* case is wholly different from these cases. The Government did not attempt to support its position in *Toth* on the ground that he had been taken out of the United States after his arrest—the fact which defendants cite as making that case the analogue of these (Def. Supp. Br., p. 134)—and it is not difficult to imagine what short shrift the Court would have given to an argument that military jurisdiction which was invalid in this country could have been obtained by forcible removal of the ex-serviceman from the country.

explicitly ask that this be done. Apart from the historical and theoretical difficulties of now adopting the contrary principle, there are the practical problems which loom large in this day of the equality of nations, even larger than in the era of capitulations when the more powerful could perhaps coerce the weaker states. Today we cannot impose our own will, and if the constitutional requirements are such that they cannot be met or are unacceptable to the foreign government, the result may well be that no American trial can be held at all.

Throughout our Supplemental Brief on Rehearing (particularly in Points I and II), we have tried to set out the factors which move, and are likely to move, the countries in which our forces are located:—*e. g.*, the concern for an on-the-spot trial in many cases of violation of local law; the unlikelihood that American civilian courts and juries would be permitted to sit abroad; the unwillingness to permit removal to this country of American committing offenses which are also local crimes. We have also touched upon the difficulties, from the purely American point of view, of removal to this country and trial in a federal court here. See also, for further discussion, Point III, *infra*, pp. 61–81. The insuperable problems inherent in having grand and petit juries, composed of Americans, sitting in foreign territory are so plain as to need no elaboration.[*]

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[*] Defendants do not suggest that the United States could assemble a grand jury and a petit jury overseas. It is patent that any such jury, whether gathered from American servicemen, tourists, dependents or employees, or of foreign nationals who volunteered, would not meet the standards required for impartial jury selection.

As we point out in our Supplemental Brief on Rehearing, the probable result of the interplay of these multiple factors would be that, if the Article III and jury provisions are made applicable to overseas crimes, there could be no American trial at all. There would either be a trial by the foreign government, or no trial. But Congress has clearly indicated its wish that Americans like these defendants be tried by an American tribunal. See our Supplemental Brief, pp. 55–57, and our Reply Brief on the original agreement, pp. 17–18, 22. It seems to us unreasonable, as well as anti-historical, to hold now that this wish cannot be fulfilled—that the United States, unlike all other countries, has so severely incapacitated itself to deal with practical situations outside its borders.[7]

C. CONGRESS MAY APPROPRIATELY USE A MILITARY TRIBUNAL TO EXERCISE THE JURISDICTION WHICH IT IS ALLOWED BY FOREIGN COUNTRIES TO EXERCISE OVER MILITARY DEPENDENTS AND EMPLOYEES ABROAD

1. The distillation of our discussion in parts A and B of this Point (as well as, we believe, of the Court's opinion of last June) is that there is implied in the full power with which the United States, as a sovereign, is vested in order to maintain an effective control of foreign affairs the specific authority to regulate the conduct of Americans abroad, to provide for

[7] Another illustration may be useful. At the present time there are in the antarctic some 125 civilians who are part of the United States expedition which is a part of the International Geophysical Year project in which various countries are cooperating to obtain fundamental research data about the nature of the earth's atmosphere. The United States must certainly have the constitutional power to provide for punishment there of one of these men, irrespective of his military status, should he commit a crime, provided it does so with due process of the law.

them, a criminal code, and to establish *appropriate tribunals* abroad for the trial of offenses.[7] The requirements of Article III and the jury provisions of the Fifth and Sixth Amendments do not apply, but the Due Process Clause would govern, just as it governs all other Congressional powers.[8]

The issue thus narrows to whether a court-martial is such an appropriate tribunal for this class of case, and whether Article 2 (11) of the Uniform Code is a reasonable exercise of power in these circumstances. That was the test applied in the Court's opinion of June 1956. We have shown in our Supplemental Brief on Rehearing that the Court's conclusion was fully justified. See, *infra*, pp. 23–81, for further discussion of historical and practical considerations, and also our reply brief on the original argument, pp. 2–22, 29–30. We do not repeat these arguments at this point, but it is well, once again, summarily to lay the ghost of procedural unfairness in military trials. The Uniform Code of Military Justice provides in high degree procedural safeguards for an accused. In many ways its level is higher than the standards required of the States by the Fourteenth Amendment. (In this connection it should be recalled that under the federal system murder, as well as most of the crimes with

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[7] The Necessary and Proper Clause applies, of course, to the foreign affairs powers of Congress as well as its others.

[8] Defendants erroneously maintain (Def. Supp. Br., pp. 116 *et seq.*) that "the military considerations adduced are relevant only to the Clause 14 power." On the contrary, these considerations are directly pertinent in determining whether courts-martial are *appropriate* tribunals for trying these service wives—wholly apart from clause 14. The situation of "non-military" civilians abroad—*e. g.*, tourists—might well be different (see 351 U. S. at 480, and our Memorandum in Reply to the Petition for Rehearing, p. 8).

which we are here concerned, is a crime that is almost invariably tried in State courts.) There is no question but that the Uniform Code provides for a fair trial.[9] See our reply brief on the original argument, p. 30.

2. Defendants argue, however, that Congress is precluded from utilizing the court-martial system for their trial overseas because that system is basically established under Article I, section 8, clause 14 of the Constitution which does not cover the defendants, of its own force. Assuming for this part of our argument that clause 14, in itself, would not authorize the defendants' court-martial (but see Point II, *infra*, pp. 23–61), their contention is nevertheless unsound. Where appropriate, Congress may use a tribunal created under one constitutional power to exercise authority granted under another. In other instances Congress has adopted a statute under one grant of power and made it applicable to conditions resting on a different constitutional authority.

For example, the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 902—which rests on the Commerce Clause—was made applicable by a simple summary reference to general employment within the District of Columbia—which Congress governs under clause 17 of section 8 of Article I

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[9] Defendants' concern over the Code's lack of protection against excessive bail (Def. Supp. Br., p. 95) is not well founded. In those cases where bail would normally be allowed by a civil court, military authorities, having other sanctions and needing no bond, normally allow the accused at least the freedom of the base on his own recognizances. In cases involving murder, such as those here, bail is not usually allowed by any court.

[10] The Act of May 17, 1928, 45 Stat. 600; See *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 471.

of the Constitution." Similarly, the District of Columbia courts exercise powers stemming from Article I as well as Article III powers. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *O'Donoghue* v. *United States*, 289 U. S. 516. The federal district courts also exercise authority, under the Tucker and Tort Claims Acts, in fields in which Congress derives its power solely from Article I. *Williams* v. *United States*, 289 U. S. 553; cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582. The postal savings system, which draws support from the borrowing clause of section 8 and other non-postal powers, has been entrusted to the Post Office Department established under the postal clause of section 8. As these instances prove, there is nothing incongruous or extraordinary in the use by Congress of an instrumentality fundamentally created under one power (here, the court-martial system) as the organ for implementing another power (here, the implied power to regulate the conduct of Americans overseas).

For the same reason, there is no merit to the argument (Def. Supp. Br., pp. 101 *et seq.*) that the provisions of the Uniform Code of Military Justice applicable to defendants' conduct *must* stem from clause

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[11] In comparable fashion, the Longshoremen's and Harbor Workers' Compensation Act was extended to overseas defense bases. Act of August 16, 1941, 55 Stat. 622, 56 Stat. 1035, as amended, 42 U. S. C. 1651; see *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 505. Congress's power in this instance was derived from its power over possessions, the war power, and the foreign affairs power.

14 of section 8.[12] We have shown that, insofar as it relates to individuals covered by Article 2 (11), the Uniform Code can and does derive support from powers other than those granted by clause 14. Congress might have followed the example of the Longshoremen's Act by providing in a separate statute, or at the end of the Uniform Code, that the persons now covered by Article 2 (11) should be deemed subject to the Code; it certainly can make no constitutional difference that Congress chose instead to incorporate Article 2 (11) directly into the Code.

Moreover, it was appropriate for Congress to determine, before it sent its forces overseas, the kind of United States jurisdiction it could represent to the host country it was prepared to exercise, and the implementation of which it was prepared to seek. The basis of negotiation with the territorial sovereign would be the availability of trial under United States law; and Congress has simply determined that the available United States law is as defined in the Uniform Code rather than in a separate system of courts or substantive law.

3. Likewise, there is nothing in clause 14 (or elsewhere in the Constitution) prohibiting Congress from making use of a military tribunal—even though such a tribunal might be otherwise appropriate—to try civilian dependents and employees. Courts-martial are certainly capable of trying civilians and have con-

[12] Defendants say (Def. Supp. Br., p. 102): "Absent the Clause 14 power, no law made criminal the acts for which these women were tried, a feature that plainly differentiates the *Ross* case".

sistently been so used, in proper cases, for centuries. See *infra*, pp. 27, 37, and our original brief in No. 701, pp. 31 *et seq.*; our original brief in No. 713, pp. 38–47, 59–68; our original reply brief, pp. 25–28; our supplemental brief on rehearing, pp. 76–80. And as shown by our supplemental brief on rehearing, pp. 64 *et seq.*, and *infra*, pp. 23–61, there is no indication in the historical materials, or in the experience of the framers of the Constitution, that courts-martial were to be so rigidly limited as to be incapable of appropriate use even where such use was not forbidden by any other provision of the Constitution. In short, there cannot be read into clause 14 an implied prohibition against a Congressional choice of courts-martial as the appropriate tribunal for the trial abroad of service wives like the defendants.

4. Similarly, it is unimportant whether courts-martial are called "legislative" or "executive" courts (Def. Supp. Br., pp. 80–96). The real question is whether, when the United States obtains consent to try its citizens for a local offense on foreign soil, there must be a trial by an Article III court subject to the jury provisions of the Fifth and Sixth Amendments, or whether trial may be by some other form of tribunal which accords due process. So long as Article III and these provisions do not automatically apply—as we have shown (*supra*, pp. 7–10)—the only issue is whether the particular tribunal selected by Congress is an appropriate one. The use of the term "legislative court" is merely a shorthand method of distinguishing such tribunals from Article III courts like

the federal district courts within the United States. Whatever the overseas tribunal be called, the test of its validity is simply its appropriateness and its basic capacity to accord a fair trial in the circumstances.

II

HISTORICAL EVIDENCE DEMONSTRATES THAT ARTICLE I, SECTION 8, CLAUSE 14 OF THE CONSTITUTION UNQUESTIONABLY AUTHORIZED CONGRESS TO MAKE WIVES WHO ACCOMPANY THE ARMED FORCES OVERSEAS SUBJECT TO MILITARY DISCIPLINE AND JURISDICTION

It is agreed that the scope of the power conveyed in clause 14 of section 8 of Article I of the Constitution is *at least* as broad as the contemporary British and American practice at the time of the adoption of the Constitution.[12] Defendants point out that in construing the clause 14 power "we look first to the English Law as it stood at the time of the adoption of the Constitution" (Def. Supp. Br., p. 32), and do not suggest that that power is in any way less than that which was then customarily being exercised by court-martial. In fact, defendants explicitly assume that the "land and naval Forces" should be deemed to encompass those persons covered by the Articles of War then in force (Def. Supp. Br., p. 36). Defendants further state their view that during the period of the adop-

[12] We do not, of course, concede that Congress cannot expand court-martial jurisdiction beyond that known at the time of the adoption of the Constitution, so long as the expansion remains within the general boundaries set by clause 14. See our Supplemental Brief on Rehearing, pp. 64 *et seq.* In the present Point, we urge merely that Article 2 (11) was not an expansion of court-martial jurisdiction as it was known in the 1780's.

tion of the Constitution and the succeeding years the boundary between civil and military jurisdiction in the two countries, Britain and the United States, remained identical (Def. Supp. Br., p. 35), and stress throughout their brief (*e. g.*, pp. 40, 71) that wives like Mrs. Covert and Mrs. Smith could not be tried by court-martial at the time the Constitution was adopted but were undoubtedly entitled to jury trial by a civilian court. In our previous briefs, we have challenged that assumption generally (see our original briefs in No. 701, pp. 32 *et seq.*, and in No. 713, at pp. 40 *et seq.*; our Supplemental Brief on Rehearing, at pp. 76 *et seq.*), but have not fully documented our position. In the light of defendants' consistent and repeated claim, and with the aid of newly-discovered materials, we now proceed to supply further detailed documentation.

The materials uncovered since our prior brief on rehearing was written confirm that there is nothing new and revolutionary in the concept of accompanying civilians, and particularly wives, as bearing an integral relation to the land and naval forces. To the contrary, it appears that in the colonial period and during the war of independence accompanying wives were regarded by both the British and American armies as a necessary part of the armed forces, subject to military order and military discipline. It appears in fact that the concept of retainers to the camp—as persons who have been, from the first, subject at all times to military discipline—included accompanying wives. By granting military jurisdiction over accom-

panying wives only where American civil law does not apply. Article 2 (11) is wholly within the concept of military jurisdiction with which the framers were familiar.

A. DURING THE COLONIAL AND REVOLUTIONARY WAR PERIOD, ACCOMPANYING WIVES WERE REGARDED AS RETAINERS TO THE CAMP

Defendants argue that the Articles of War in effect when the Constitution was adopted were restricted to retainers[14] to the camp and to those serving with the armies in the field and that they therefore "covered only individuals whose duties had some functional connection with the armies". (Def. Supp. Br., p. 40). We need not argue over the phrase "functional connection" provided that the concept is construed as it was then, for the fact is that retainers to the camp included wives and other dependents and that they were considered to have whatever "functional connection" was required to make them subject to court-martial jurisdiction.

1. The dictionary definition of "retainer" current at the time goes far to establish the point. The sole definition of retainer given in Noah Webster's *A Dictionary of the English Language* published in 1807 is "A dependent". Winthrop, however, is even more explicit. He states that the term retainers to

[14] Article 32 of the American Articles of War adopted by the Continental Congress June 30, 1775, spelled the word as "retailers." This is an apparent clerical mistake, since both the British Articles on which it was based and subsequent American Articles from 1806 on spelled the word as retainers. See *Madsen* v. *Kinsella*, 343 U. S. 341, 349, fn. 15. Defendants do not suggest otherwise.

the camp "may be deemed to include:—1. Officers' servants; 2. Camp-followers attending the army but not in the public service." He goes on to state:

> Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. [Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, pp. 98, 99n.]

The term camp-follower, which was encompassed in the concept of retainer to the camp, was at the end of the eighteenth century in no way limited to the modern colloquial usage of a woman of loose morals. The Oxford English Dictionary defined camp-follower as "A man or woman who follows or hangs on to a camp or army, without being in military service", and in fact gives, as an illustration of its use in 1810, an excerpt from a letter by Wellington referring to "The proceedings of the General Court Martial, on the trial of Edward Poole, Camp follower." [15]

2. A study by Walter Hart Blumenthal, entitled *Women Camp Followers of the American Revolution* (1952),[16] reveals that in the colonial period accompanying wives were regarded as a regular part of British armed contingents. He notes (p. 45) that "there was British precedent over here of women with the forces, for a score of years before the Declaration[;] a feminine contingent was conveyed from England

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[15] A New English Dictionary on Historical Principles (1893), vol. 2, p. 55.

[16] In view of the importance which the status of women with the army at the time of the Revolution has to the scope of the constitutional power here involved, nine copies of Mr. Blumenthal's book have been filed with the Clerk for the use of the Court.

with Braddock's command at the outset of the French and Indian War." And further (p. 53):

> British camp women in the Revolution were an established institution. It was the tradition that men-at-arms needed women at arms. Nor did the Revolution end the British tradition. Wellington's army in the Peninsular War (1809–1814) had its share of wives and wenches—forty to sixty in every regimental following, astride donkeys, with scores, nay, hundreds, of Portuguese and Spanish helpmates picked up on the road.

That such accompanying women, including wives, were considered subject to court-martial jurisdiction appears from a letter written by one such wife on June 4, 1758, to Colonel Bouquet from Carlisle jail where her husband was confined for cause and she likewise, for having abused the colonel. In her letter (*id.*, p. 49) she said:

> I have been a Wife 22 years and have traveld with my Husband every Place or Country the Company marcht too and have workt very hard ever since I was in the Army. I hope yr Honour will be so good as to Pardon me this onet time that I may go with my Poor Husband one time more to carry him and my good Officers water in ye Hottest Battle as I have done before. Yr unfortunate Petitioner and Humble Servant, Martha May.

Women were sent over with British troops during the American Revolution, including the early period before the Declaration of Independence when, from the British point of view at least, there was no war, but merely disorder in the colonies. General Sir William Howe's Orderly Book for the period from June

17, 1775 to May 26, 1776, show that the British treated the women as a regular part of the army. Orders were regularly issued to account for the women so that provisions could be issued for them.[17] Their conduct was regulated.[18] Some form of punishment was also

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[17] E. g.:

"*Camp on the Heights of Charlestown—6th July 1775*" [pp. 34–35]

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"A List of the Names and a return of the Numbers of Women and Children in every Corps Encamp'd here to be given in immediately specifying those present with the Corps that the issuing their provisions may be properly regulated, and the quantity ascertained."

"*General Orders Dated Head Quarters—Boston 6th July 1775* [p. 35]

"A return of every Officer, Serjeant, Drummer, Rank and file of each Corps, As also a List of the Names of the Women Children and all other persons followers of the Army, not Soldiers, for whom the Corps draw provisions to be given to the Dy Adjutt Genl on Wednesday Morning next."

"*Head Qrs Wednesday, 13th March 1776* [p. 235]

• • • • •

"Each Corps to apply immediately at No 16 on the long Wharf for a Barrel of Salt fish, to be divided among the Men & Women."

"*Head Qrs Thursday 2d May 1776* [p. 262]

• • • • •

"Six Women pr Compy will be allowed to embark with each Rgt, the Commanding Officers will be responsible that no more Women are received on board nor any Children.

"Provisions will be allowed at the rate of half a Ration for each Woman, & a Quarter for each Child that is left behind."

"*Hd Qrs Halifax Tuesday 21st May 1776* [p. 287]

• • • • •

"The Commanding Officers of Regimt & Corps are desired to send returns immediately to the Deputy Qr Mastr Genl of the Number of Officers men & Women that they allot to their respective Transports in order that provisions may be put on Board accordingly."

[18] E. g.:

"*Head Quarters Boston 18th Novr 1775* [p. 143]

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ontemplated, often merely by dismissal from camp, ut sometimes more severely. Mr. Blumenthal's book, p. 42) reports that:

> The wife of a private who was detected as a receiver of stolen goods was sentenced to "one

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"Women belonging to the Army will not be Allowed to be present at any Fires that may happen."

"*Head-Qrs Boston, 30th Decr 1775* [p. 185]

• • • •

hundred lashes on her bare back, with a cat-o'-nine tails, at the cart's tail, in different portions of the most conspicuous parts of the town, and to be imprisoned three months."

And for a later period, General Burgoyne's Orderly Book reports the following:

> CAMP NEAR TICONDEROGA,
> 3d July, 1777.
> Countersign, *Dover.*
>
> Parole, *St. Honora.*
>
> Brigadier Generals and Brigade Majors as yesterday.
>
> Field Officer Piequet British, Lieut. Col. *Hill.*
>
> Field Officer Piequet German, Major *Paffem.*
>
> It being apparent that Liquor is sold or given to the Savages, nothwithstanding the positive and repeated Orders to the Contrary, the Commanding Officers are to assemble the Sutlers and Women of the respective Regiments, and inform them that the first person found guilty of disobedience shall instantly have their liquors and sutling stores destroyed and turned out of Camp, besides receiving such Corporal *Punishment* as a Court Martial shall inflict. * * * [p. 24]

Other British cases of the trial of women as retainers to the camp include the general court-martial in December, 1775, in Boston, of Anne Hennesy, wife of a private, who was charged with her husband of having broken into a house and stolen property. Both were found not guilty.[19] A general court-martial sitting in Quebec October 26 to November 1, 1760, tried

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"Women belonging to the Army *convicted* of selling Spirituous Liquors will be confined in the Provost till their is an oppy of sending them away from hence." (emphasis added)

[19] *General Courts Martial for Marching Regiments, 1775 to 1776,* folio 202, Public Record Office, London.

Elinor Russell, wife of a soldier of the 35th Regiment, for receiving and buying stolen goods. She was found not guilty.[2] In March, 1761, a general court martial held in Montreal tried Katherine David, "spouse of Mr. Bove," and Etief, a Negro woman, for receiving stolen property. It should be noted that these last two cases occurred in peace time, the French and Indian War having ended and the French having signed terms of capitulation on September 8, 1760.

At Freehold, New Jersey, on June 27, 1778, Elizabeth Clarke, a "follower of the army", was found guilty by a general court-martial of violation of the articles of war for plundering and destroying the house of a farmer, and sentenced to 100 lashes "and then to be drummed out of the Army." The same general court-martial found Mary Colethate, another follower of the army, not guilty of the same offense. Two other women were tried by a general court-martial sitting on Long Island in July 1778 and found not guilty. One was Mary Jefferies, "follower of the Army", tried for persuading a soldier to desert. The other was Lucretia Ellis, described as a nurse in the regimental hospital, who was tried for murder.

3. This British practice was carried into the American armies during the revolution. Mr. Blumenthal's book reports (pp. 60-61):

> Among American militia and the Continental line there were far fewer camp wives or other women than with the enemy. Many of the colonial soldiery, whether seasoned volunteers

[2] These and the immediately succeeding cases were obtained from unpublished documents in the Public Record Office, London.

> or raw levies, though married were footloose or homeless as a consequence of localities occupied by the British; hence uprooted wives often went along. Efforts were constantly made to curb irregularities and to keep down strumpet stragglers. The basic reasons for permitting camp women were not only that the practice prevailed among all armies, and the knowledge that quotas of women were with the British, but the inescapable fact that inroads of the redcoats had rendered patriot flight necessary in several areas, together with the natural desire of the women to care for their men—an impulse recognized by the American military leaders.

And further (p. 72):

> As the war dragged on, the army was welded, and the recognition of camp women as a collateral part of the forces became imperative. A routine grew up in this as in other matters. That discipline was instilled into the new Continental Army is seen by the orders. In the 2nd and 4th New York Regiments there were more than three hundred courts-martial cases from 1778 to 1783.

The *Writings of Washington* reveal that he regarded accompanying women as a necessary, if not always wholly desirable, part of his forces. Thus in a letter to the Superintendent of Finance dated January 29, 1783 (v. 26, Writings, pp. 78–79), he explained what was evidently regarded as excess expenditure for women:

> dear Sir: As I never saw, nor never heard of the resolve of Congress spoken of the Secretary at War (as mentioned in your letter of

the 21st Inst.) and conceive it a right inherent, with Command to limit (as circumstances and the nature of Service may require) the proportion of Women to the Men of an Army I confess I felt myself hurt by the interference of other departments without any previous notice or communication of sentiments with me on the Subject.

* * * * * *

It will appear, by having recurrence to my Orderly Book, that an oeconomical attention to the public interest, in this case, has not been wanting; but that upon every return of the number of Women called for (at different periods) when compared with the totality of the Army, it has been found, that no general Rule consistent with American, or British Customs, could be established that would not encrease the agregate amount of the Issues and therefore that it was better to submit to a surplusage in some Corps than to render the expence greater and the evil more extensive by adopting a limitation whh. would pervade the whole Army, especially too, as some of those Corps were, and still are, under particular circumstances, for instance the Regiments of York, which, in part, are composed of Long Islanders and others who deal with their families when the enemy obtained possession of those places and have no other means of Subsistance. The Cries of these Women; the sufferings of their Children, and the complaints of the Husbands would admit of no alternative. The latter with too much justice remarked "If *pay* is with-held from *us*, and *Provisions* from our *Wives* and *Children* we must all starve together; or commit Acts which may involve us

> in ruin." Our Wives add they "could earn their Rations, but the Soldier, nay the Officer, for whom they Wash has naught to pay them." In a word, I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion, perhaps to the Enemy, some of the oldest and best Soldiers in the Service. * * *

And in a letter to Major General Knox, dated March 8, 1783, he said (v. 26, p. 199):

> Dear Sir; The Women of the New York Regt. of Artillery have applied to me on the Subject of allowing them and their Children Provisions.
>
> The number of Women and Children in the New York Regiments of Infantry, before the new System of Issues took place obliged me, either to depart from that System and allow them provision or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives. I preferred the former and accordingly directed that the whole of the Women and Children then with the Troops, should be allowed to draw as usual. * * *

The report of a meeting of the Board of General Officers on June 12, 1781 (v. 22, pp. 202-203), contains the following:

> The Commander in Chief urged to the Board the necessity of oeconomising Provisions, and recommended to the Generals, particularly the Brigadiers, the Necessity of inspecting the Returns made by their Commissaries upon every drawing Day, * * *. He also desired

them to take the following Matters into Consideration and report upon them accordingly.

* * * * *

4th: The proportion of Women which ought to be allowed to any given Number of Men, and to whom Rations shall be allowed.

That Washington considered the accompanying women subject to court martial jurisdiction is clear from the following order dealing with the constantly troubling problem of transportation (v. 22, p. 233):

General Orders. Head Quarters, New Windsor, Tuesday, June 19, 1781.

* * * * *

No Women will be suffered to ride in Waggons or walk in the ranks this Campaign unless there are very particular reasons for it, of

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The provisions of transportation are illustrated by the following (v. 15, p. 204):

"General Orders. Head Quarters, Smith's Tavern, Monday, June 5th, 1780.

* * * It was too observed that of the heavy baggage of the Army has been very little, if anything diminished, and that the pernicious practice of suffering the women to ride under the Waggons still continues notwithstanding every former prohibition. The General recommends these matters to the particular attention of the officers commanding brigades and that they will take the most vigorous and effectual measures to prevent the like abuses hereafter."

(v. 9, p. 139):

"General orders. Head Quarters, Wilmington, August 27, 1777.

* * * the women are expressly forbid any longer, under any pretence at all, to ride in the waggons, and the officers earnestly called upon to permit no more than are absolutely necessary, and such as are really useful, to follow the army."

> which the General Officer or officer commanding the Division or brigade to which they belong is to be the judge; a written permission only will avail; without this the officers of the day or police are not only authorized to turn them out, but requested to inflict instant punishment upon those who shall be found transgressors of this order.

One cannot dispose of this historical evidence that women accompanying their husbands (or alleged husbands) were treated as an integral part of the army by the fact that the accompanying took place in time of hostilities. The bulk of the available evidence relates to times of hostility because that is the time when the problem would be most troublesome, and because the historical materials for that period have been collected. As set forth, *supra*, the historical evidence also appears to show that women were subject to military jurisdiction in times of peace as well. The very fact that, even in time of hostilities, accompanying wives were considered so necessary that they be kept in camp lest the best soldiers be lost (see *supra*, p. 34) indicates how functionally related to the army the accompanying women were thought to be. Certainly, this evidence makes it clear that the framers of the Constitution, some thirty to thirty-five of whom had military experience in the revolution,[29] would not have been shocked at the thought that soldiers' wives, who accompanied them to camp, would be subject to military jurisdiction. The women, wives as well as

[29] A list of those with military experience is given in Appendix D, *infra*, p. 101.

hangers-on, were obviously regarded as camp followers, subject to military jurisdiction because they were an integral part of the army.

Wives today who accompany their servicemen husbands overseas fulfill a role that is not so different from that of the wives who served with the army in the colonial days. Wives today, as then, are allowed to accompany the army because of the interest which the country has in retaining the soldiers in the service and keeping their morale high. Today, as then, wives prepare meals for their husbands, sew buttons on their uniforms, and attend to their wants. Contrasts exist, but the basic relationship to the army has not changed. Certainly the groups are not so different that what was constitutional for one is unconstitutional for the other.

B. DURING THE REVOLUTIONARY PERIOD, CIVILIAN EMPLOYEES OF THE ARMED FORCES WERE SUBJECT TO MILITARY JURISDICTION.

The historical evidence also establishes that the framers were familiar with the concept of military jurisdiction over civilian employees. After the 1775 Articles of War, the Continental Congress provided in 1776 (Journals of the Continental Congress, Vol. V, p. 800):

> All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war.

And in 1778 (Journals, Vol. X, p. 72):

> *Resolved*, That every person employed either as Commissary, Quarter Master, forage Master

or in any other Civil Department of the Army shall be subject to trial by Court Martial for neglect of duty, or other offence committed in the execution of their office, and upon conviction shall suffer death, or such other punishment as shall be adjudged by sentence of such Court Martial.

The *Writings of Washington* show that such court-martial power was in fact exercised. For example,

General Orders [v. 12, p. 242]

Head Quarters White Plains, Monday, July 27, 1778.

* * * * *

At a General Court Martial, July 17th. 1778, Colo. Putnam, President, Mr. James Davidson, Quarter Master of Colo. James Livingston's Regiment tried for defrauding the soldiers of their Provisions, embezzling Continental Property and disposing of several Articles belonging to the United States, found guilty and sentenced to be cashiered.

General Orders [v. 16, pp. 385–386]

Head Quarters, Moore's House, Friday, October 1, 1779.

At the same Court, Benjamin Ballard, late Assistant Commissary of Issues to General Paterson's Brigade was tried for "Selling rum, flour, pork, hides, tallow and other Stores the property of the public without any orders or authority for so doing and contrary to the tenor of his bond and oath of office."

* * * * *

Mr. Paterson Assistant Commissary of Hides was tried at the same Court for "Giving a Pass to a soldier in the Maryland line without authority."

General Orders [v. 20, p. 96]

Head Quarters, Orangetown, Wednesday, September 27, 1780.

* * * * * *

At the General court martial whereof Colonel H. Jackson is President, the 23d. instant: Thomas Thomson, Forage master to General Hand's brigade was tried for "Exchanging public Oats for bridles."

* * * * * *

At the same Court, Abraham Cooper, a waggoner was tried for "Embezzling public stores when employed in Carting the same to the Army" and acquitted. He is to be released from Confinement.

General Orders [v. 21, p. 10]

Sunday, December 24, 1780.

At a General court martial whereof Colonel H. Jackson was President, held at Westpoint the 16th. instant, Mr. Benjamin Stevens, issuing Commissary at Fishkill, was tried for "Refusing to deliver provisions to Arch. Leake, waggoner of the Hospital on the order of the Steward of the Hospital at Fishkill on which he usually issued, because he, the said Leake, would not receipt in figures for said provision, and also for taking receipts in figures for provisions issued on orders for an indefinite quantity for the said Hospital."

General Orders [v. 21, pp. 22–23]

Thursday, December 28, 1780.

At a General court martial whereof Lieutenant Colonel Forrest was President, held by order of the Honorable the Board of War in Philadelphia the 6th. of December 1780: Mr. Thomas Dewees, Barrack master, was tried on

the following charges vizt. 1st. "Neglect of duty" 2d. "For a partial distribution of wood." 3d. "For undertaking an office he was not qualified to hold having never taken the Oath of Allegiance to the United States or any particular State." 4th. "For not taking the Oath of Office before he acted according to a resolution of Congress of the 15th. of July last." 5th. "For selling public wood to the prejudice of the service."

To Colonel William Shepard [v. 21, p. 190]

Head Quarters, New Windsor, February 5, 1781.

Sir: You will be pleased to Order a General Court Martial to sit at Springfield, or such place as will be most central and convenient, for the tryal of John Collins late Asst Dep Com. M. Stores. The Court to be composed of the Officers of Sheldons Regt. or others in the Vicinity. The charge will be exhibited and testimony adduced by Ezekiel Chevers Esqr Deputy C. M. S.

See also volume 21, pages 215, 354.

The analogy of these offenses to such present day offenses as fraud, embezzlement, black marketeering, etc., is too obvious to need comment.

C. THE CONCEPT OF "IN THE FIELD" WAS NOT LIMITED TO A TIME OF HOSTILITIES BUT COVERED A FORCE PLACED IN A DEFENSIVE POSTURE WITH A VIEW TO A POSSIBLE ENEMY AND ANY FORCE LOCATED WHERE THE CIVIL POWER OF THE HOME GOVERNMENT COULD NOT OPERATE

Despite slight variations in punctuation and phrasing,[24] jurisdiction over retainers to the camp and civilians accompanying the armed forces was always limited to persons accompanying the armies "in the field". The limitation "in the field", however, operates not at all against the constitutionality of Article 2 (11) for, as we develop below, the limitation of Article 2 (11) jurisdiction to civilians accompanying the armed forces into foreign territory where the civil law of the United States cannot operate is wholly in line with the concept of "in the field" that prevailed when the Constitution was adopted. Historically, "in the field", did not mean, as defendants would now have it, accompanying the army in time of actual hostilities in the zone of military operations. Historically, "in the field" meant an area where the nature of the operation or the absence of civil author-

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[24] "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field • • •" (British Articles of War of 1765, Sec. 14, Art. 23) Winthrop, p. 941.

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field • • •" (American Articles of war of 1775, Art. 32) 2 J. Cont. Cong. 111.

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field • • •" (American Articles of War of 1806, Art. 60) Act of April 10, 1806, 2 Stat. 359.

"All retainers to the camp, and all persons serving with the armies of the United States in the field • • •" (American Articles of War of 1874, Art. 63) R. S. §1342.

ity made military control over the whole camp appropriate.

After the civil war, and in particular after the decision in *Ex parte Milligan*, 4 Wall. 2, pointing out, in relation to martial law, that the civil courts of the United States were open and available throughout the United States, the principle developed that military jurisdiction over civilians was unnecessary in the United States in peace-time because civilian courts were available. There then appeared for the first time language to the effect that jurisdiction over civilians could be exercised only in time of war in the theatre of hostilities. This change in the formulation of the scope of court-martial jurisdiction—which continued to reflect the notion that military necessity is a justification for military jurisdiction—took place in connection with cases where the only issue was the exercise of military jurisdiction within the United States and must be considered in the light of that cardinal fact. It also took place 75 years after the Constitution was adopted. The reasons which gave rise to this different wording of the concept of "in the field" do not apply to the situation here, which relates to the necessity for military jurisdiction over persons accompanying the forces into territory where United States civil law does not operate at all. That precise situation was "in the field" as the framers of the Constitution understood it.

1. The British concept of "in the field" in 18th and early 19th centuries is shown by their Articles of War, by writers, and by the British practice. The British

Articles of War of 1765 were very complete, containing over 100 articles of which more than 40 were not incorporated into the Articles adopted by the Continental Congress in 1775. Defendants do not suggest that the omission of these articles in any way reduced the *constitutional* concept of persons subject to military jurisdiction and in fact, as discussed above (*supra*, p. 23), defendants recognize that the British concept of the scope of military jurisdiction is that which the Constitution authorizes.

Article II of Section XX of the British Articles of 1765 read as follows:[23]

> Notwithstanding its being directed in the Eleventh Section of these Our Rules and Articles, that every Commanding Officer is required to deliver up to the Civil Magistrate all such Persons under his Command who shall be accused of any Crimes which are punishable by the known Laws of the Land; yet in Our Garrison of *Gibraltar*, Island of *Minorca*, Forts of *Placentia* and *Annapolis Royal*, where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops are or may be hereafter commanded, and where there is no Form of Our Civil Judicature in Force, the Generals or Governors, or Commanders respectively, are to appoint General Courts-Martial to be held, who are to try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes, Coining or Clapping the Coin of *Great Britain*, or

[23] For example, they included an express provision saying that they should apply to troops raised in America. Art. I, Sec. XIX, Winthrop, p. 946.

> of any Foreign Coin current in the Country or Garrison, and all other Capital Crimes, or other Offences, and punish Offenders with Death, or otherwise, as the Nature of their Crimes shall deserve.[36]

It was thus made explicit that military jurisdiction over other persons was to be more extensive when the troops were "beyond the Seas * * * where there is no Form of Our Civil Judicature in Force".[37] This broad jurisdiction existed in time of peace as well as war.[37]

The military writers bear out and explain the extent of this generally understood scope of British military law. E. Samuel, in his *Historical Account of the British Army and of the Law Military* published in London in 1816, explains the necessity for the exercise of such jurisdiction on pages 691–692, as follows:

> Armies, serving in the field, are at all seasons accompanied by a long train of followers, administering to the support, comfort, and convenience of the troops—some of them public functionaries, such as commissaries, contractors, and their subordinates; and others, of a private condition, as victuallers, shopkeepers, and private dealers, with servants or attendants, attached to the service of the camp, or of

[36] Winthrop, p. 946.

[37] It seems probable that this article was not adopted by the Continental Congress simply because the colonies, unlike the British Empire, did not contemplate sending troops to "any * * * place beyond the Seas * * * where there is no Form of Our Civil Judicature in Force * * *". Today, however, the United States is in a position comparable to that of the British Empire in the 18th century, insofar as deployment of troops is concerned.

individuals retained in it; the number of these different classes of persons bearing a great proportion often to the numbers of those contained in the ranks of armies. These various descriptions of persons live within the boundaries of the camp, have their appointed stations in it, and their persons and their property guarded alike with the soldiery: they are stationary as it is stationary, and move whenever it moves; all their dealings and transactions are with the military state: and their peace and quiet is so intimately connected with that of the military body, that the one cannot be disturbed without the other. Being so blended together in their local situation, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both: and the ordinary law, being wholly incompetent in its provisions and means to the military state and its affairs; which is admitted, in the formation by the legislature of separate and especial regulations for its government; and there being neither civil courts, nor instruments in the camp for the administration of the ordinary laws; and in foreign countries, the common field of operation to our armies, the laws themselves being wanting, the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could be safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.

Mr. Blumenthal, whose study of *Women Camp Followers of the American Revolution* has been referred to above (*supra*, p. 26), has, in response to an inquiry by the Department of Justice, written his conclusions as to the treatment of women camp followers in time of peace, in the pre-revolutionary period, although, because his files were unavailable, he was not able to furnish full documentation. A copy of his letter is set forth in Appendix A, *infra*, p. 82. He states that women were regularly quartered with or near British troops in British possessions in the West Indies and in the American colonies. He concludes, *infra*, p. 84:

> From early days, prior to the Revolution, women who were with British armed forces in British colonial possessions *were subject to court-martial jurisdiction in time of peace*. In frequent instances the records show punishment for female drunkenness, fighting, or theft, by the military authorities.

This historical evidence suggests that, at least as to retainers to the camp, peace-time jurisdiction over civilians was not even limited to the absence of civil authority, since there was civil authority in the colonies, but was based merely on the position of the women as an integral part of an organized camp, at what was considered an outpost. Whatever its rationale, it does establish that consideration of women accompanying the army in peace time as subject to military jurisdiction in the field was not a concept unknown to the framers of the Constitution.

But the clearest demonstration of exercising court martial jurisdiction over women camp-followers in peace time are those in which the British tried soldiers' wives for murder. Martha Stevens, "camp follower", was tried by general court martial at Saugor, India, for the wilful murder of her reputed husband, Sergeant James Stevens, by stabbing him with a knife. The crime took place on November 11, 1824, with the trial on February 8, 1825. The court found her not guilty of murder but guilty of manslaughter and sentenced her to ten months' imprisonment. The sentence was approved by General Edward Paget, Commander-in-Chief in India and was order executed by James Nicol, Adjutant General of the Army.[28]

Less than a year later, a general court-martial was assembled at Merut on August 6, 1825, to try Hannah Fitchit, a British subject and camp follower and the reputed wife of Private Joseph Fitchit. She was tried for the murder of Private Alexander Laird by stabbing him with a bayonet. She was found guilty of manslaughter and sentenced to prison for two years. The sentence was approved, but on review was mitigated to three months' imprisonment.[29]

In 1831, there was an instance in Delhi in which court-martial of an officer's wife was considered. The records show:

> The resignation had been accepted a month prior to the above transaction; otherwise both Lieutenant R. ——— and Mrs. R. ——— might

[28] Hough, *Precedents in Military Law* (1855), p. 401.
[29] Hough, *op. cit., supra*, p. 402.

> have been tried by a general court-martial; for doubtless the wife of an officer or soldier is a camp-follower.[35]

In view of defendants' recognition that American court-martial jurisdiction was intended to be as extensive as that held by the British, and their further recognition that the line between civil and military authority "remained similarly identical" in the two countries in the years following the revolution (Def. Supp. Br. p. 35), these cases must be considered as authorities directly in point.

2. The American experience during the seventy-five years following the adoption of the Constitution confirms the view that sutlers and retainers were subject to military jurisdiction in the field in time of peace.

For instance, that court-martial jurisdiction might apply to civilians once they left the United States—*i. e.*, were "in the field"—was explicitly understood by the Congress in 1800. In the Rules and Regulations for the Government of the Navy adopted on April 23, 1800, the Congress included Article XXI:

> The crime of murder, when committed by any officer, seaman, or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court martial. [2 Stat. 48.]

This Article applies to civilian seamen,[35a] who by

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[35] Hough, *op. cit.*, *supra*, pp. 628, 630.

[35a] This is abundantly clear from the text which distinguishes between seamen "belonging to any public ship or vessel of the United States" on one hand, and a "person in the navy" or "per-

virtue of the statute were left subject to civilian jurisdiction while within the territory of the United States but when outside that territory—where United States civil courts would not be effective in punishing and deterring crime—were subject to a military trial. This early statute shows the error in defendants' insistence that the Constitution should be construed so as to prohibit any statute, no matter how reasonable, which would provide in peace-time for a court-martial outside the United States for one who, if he were within the United States, would be entitled to a trial by jury.

The controlling concept of remoteness and absence of civil authority continues to be reflected in other materials. In 1814, the Attorney General, in expressing the opinion that punishment by court-martial of offences committed on board vessels commissioned under letters-of-marque was contemplated only when such offences happened out of the jurisdiction of the United States, said (1 Op. Atty Gen. 177):

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sons belonging to the navy" on the other. See, *e. g.* Articles XIII, XVI, XVII, XVIII, XXXII. Contemporary statutes referred to civilian personnel as "seamen" whether on merchant vessels (1 Stat. 729) or on other public vessels of the United States, such as revenue cutters (3 Stat. 127). The 1862 Article on the same point made it explicit that it applied to any "person belonging to any public vessel of The United States." (12 Stat. 602).

See Kensil Bell, "*Always Ready!*"—*The Story of the United States Coast Guard* (1943) for examples of public vessels manned by civilian seamen in 1800.

> The reason for the distinction may probably have been, that, unless the authority of the court-martial had been recognised for offences committed on board of those vessels when abroad, no punishment could have followed them—it being matter of great doubt how far the common code of the United States extends to the high seas; but for all such offences as may take place on board of them while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The jurisdiction of the military tribunals is not to be stretched by implication.

Similarly, actual cases arising between the War of 1812 and the Civil War support the conclusion that sutlers or retainers to the camp were "in the field" in time of peace if they were with the military away from available civil courts. These cases disprove defendants' categorical statement that "the only civilians ever tried by court-martial prior to 1916, no matter how functionally connected with the forces, were those who accompanied those forces 'in the field' in time of war, declared or otherwise—and 'in the field' was always construed to mean a theater of operations where hostilities were in progress" (Def. Supp. Br., p. 40).

The general practice was stated by the Judge Advocate General of the Army in 1866, as follows:

> "[It] . . . has been the general usage of the service in times of peace, that a detachment of troops is an army 'in the field' when on the

march, or at a post remote from civil jurisdiction."[5]

Available court-martial records supply detailed instances. In 1825, William Armistead, a sutler, was tried[6] and acquitted by court-martial at Fortress Monroe near Norfolk, Virginia, of mutiny and violation of duty, and of conduct subversive of good order and discipline.[7] There are no records of any hostilities in this area at that time. Another sutler, Jabez Burchard, was tried by court-martial in the same year at Fort Washington, Maryland, across the river from Alexandria, Virginia.[8] He challenged the jurisdiction of the court to try him, but the jurisdiction was sustained. His only punishment, however, was dismissal as a sutler.[9] Historical records likewise fail to reveal any hostilities in the area.

On August 1, 1833, W. O. West, a sutler, was tried by court-martial at Fort Gibson, for disobedience of orders.[10] There were several Fort Gibsons in the United States at the time, but at none of them were there any hostilities.[11] In 1838, records show that a clerk of a sutler, J. W. Wiese, was tried by court-martial at Fort Brooke, Florida.[12] This was during the period of the "Second Seminole War" and despite

[5] Opinion of the JAG of the Army, Nov. 15, 1866, 23 Letters sent, 331 (National Archives), quoted in full *infra*, p. —.

[6] *U. S. v. Armistead*, No. C 68, National Archives.

[7] *U. S. v. Burchard*, No. V 15, National Archives.

[8] *U. S. v. West*, No. BB 149, National Archives.

[9] The most war-like would have been Gibson City, Illinois, not far from where the Black Hawk War had ended with the capture of Black Hawk on August 2, 1832, a year earlier.

[10] *U. S. v. Wiese*, No. CC 488, National Archives.

the fact that there were no real military engagements it might possibly be classified as a time of "hostilities".

There was a series of court-martial trials at Camp Scott in Utah Territory in 1858. To meet reported defiance of federal authority by the Mormons, President Buchanan sent some 2,500 men out to the Territory. Some of their wagons and horses were stolen, and the troops spent the winter at Camp Scott. In the spring, an agreement with the Mormons was reached and most of the troops were sent elsewhere. This was not a war situation but the army was in the field. Among those tried by court-martial were James Trader[27] and William C. Barnard,[28] "citizen employees" of the Quartermaster Corps. Both of them were found guilty of conduct prejudicial to good order and discipline and given periods of confinement, one of which was remitted entirely and the other in part. Henry Ringsmer, a retainer serving with the army at Fort Bridger, Utah Territory, was tried there in 1858 by court-martial for an offense committed at Camp Scott.[29] In October 1849 five civilian seamen on board the *Ewing*, a public vessel of the United States, were tried and convicted by naval court martial for mutiny with intent to kill, off the coast of California. A plea to the jurisdiction was rejected.[30]

It is thus evident that before the Civil War the concept of "in the field" which gave the army jurisdiction over retainers and sutlers was not at all limited to a theater of operations in war-time. At the

[27] *U. S.* v. *Trader*, No. HH 882, National Archives.
[28] *U. S.* v. *Barnard*, No. HH 895, National Archives.
[29] *U. S.* v. *Ringsmer*, No. HH 880, National Archives.
[30] *U. S.* v. *Black, et al.*, No. 1237 (Navy), National Archives.

very least, it covered an organized camp in a remote place where the civil law of the United States was not functioning.

It was with this background of practical interpretation of the constitutional power that the Judge Advocate General of the Army gave his opinion in 1866 (to which we have already referred, *supra*, pp. 50-51):

> WAR DEPARTMENT,
> BUREAU OF MILITARY JUSTICE,
> *November 15, 1866.*
>
> **Respectfully returned to Bvt. Brig. Gen. Wm. M. Dunn, Asst Judge Adv. Genl.**
>
> **It is held by this Bureau and has been the general usage of the service in times of peace, that a detachment of troops is an army "in the field" when on the march, or at a post remote from civil jurisdiction.**
>
> **It has been the custom and is held to be advisable, that civil employees, sutlers and camp followers when guilty of crimes known to the civil law, to turn the parties over to the courts of the vicinity in which the crimes were committed. For minor offenses against good orders and discipline, it has been customary to expel the parties from the Army: If, however, it is sought to punish civil employees in New Mexico, for crimes committed at a post where there are no civil courts before which they can be tried, it is held that they can be brought to trial before a General Court Martial, as they must be considered as serving with "an army in the field" and, therefore, within the provision of the 60th Article of War.**
>
> **J. HOLT**
> ***Judge Advocate General***

In view of this history, there would be no authority at all to support the position now urged by defend-

ants, were it not for the views expressed by Winthrop and other military authorities in the 1870's and thereafter. We believe that these later views cannot reduce the scope of the power conveyed to Congress in the Constitution, and that the contemporary practice existing during the pre- and post-revolutionary period is a better guide to the extent of that power. Moreover, as we shall now show, these later statements reflect the idea, derived from *Ex parte Milligan*, 4 Wall. 2, that military jurisdiction should not extend to civilians where the civil courts are available—a conception not at all applicable to Article 2 (11) which operates outside of the civil jurisdiction of the United States.

3. The landmark case of *Ex parte Milligan*, 4 Wall. 2, decided in 1866, although dealing strictly with martial law, seems to have had a great effect on legal thinking with respect to military jurisdiction generally. In holding that a military commission was not authorized to try in Indiana, where the federal courts were functioning, a person "in nowise connected with the military" (4 Wall. at pp. 121–122), the majority opinion stressed the fact that a person so tried would be deprived of his constitutional rights under the Fifth and Sixth Amendments. The Court noted, at p. 127, that there might be justification for martial law "on the theatre of active military operations, where war really prevails."

These concepts, originally developed with relation to martial law, seem to have been carried over to some of the contemporary thinking on general court

martial jurisdiction, so that Winthrop could later state (p. 101) that the article of war conferring jurisdiction on persons in the field "is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war."

But a brief review of some of the conflicting opinions during this period shows that there was no consensus of interpretation of the *constitutional* powers supporting Winthrop's view.

In 1872, the Attorney General issued an opinion, which Winthrop notes, at p. 101, that civilians serving with troops in Kansas, Colorado, New Mexico, and the Indian territory, at camps where it was necessary to build defensive earthworks and where persons had been killed by Indians, were "in the field". 14 Op. Atty. Gen. 22. The opinion rested primarily on the proposition that the words "in the field" "imply military operations with a view to an enemy" and that an army was "in the field" when it was "engaged in offensive or defensive operations." But the opinion also noted, p. 24:

> Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of "an army in the field."

Subsequently, the Attorney General ruled that civil engineers employed by the Navy were subject to court-martial jurisdiction. 15 Op. Atty. Gen. p. 597. This was done without considering the question of "in the field" at all, but on the theory that such engineers were part of the Navy. A brief opinion

of the Attorney General on June 2, 1876, that a quartermaster's clerk was amenable to court-martial jurisdiction (unpublished opinions, Letterbook No. 4, page 32), again without reference to the "in the field" problem, brought a reaction from the Judge Advocate General of the Army. His two opinions on this subject (available only in the National Archives and printed in Appendix B, *infra*, p. 86) brought a reversal from the Attorney General in his opinions of May 15, 1878 (16 Op. Atty. Gen. 13) and of June 15, 1878 (16 Op. Atty. Gen. 48). Since the case at this stage involved the general question of the status of quartermaster clerks and superintendents of national cemeteries, there was no question of anyone's being in the field and the Attorney General explicitly did not consider the scope of that concept (16 Op. Atty. Gen. at 15).

The consequence of this holding that clerks and employees (not even alleged to be in the field) were not subject to court-martial jurisdiction, seems to have been a general acceptance of the thought that no civilian could be tried by court-martial in time of peace. But all such statements were made with reference to cases within the United States. And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that—barring unusual circumstances—it was no longer possible to be "in the field" in the United States.

Because of the settled conditions in the United States, with civilian courts everywhere available, and because of the policy of the military not to assert jurisdiction over civilians, reflected in the opinions

mentioned above, the question of what constitutes "in the field" in peacetime simply did not arise after the Civil War. That "in the field" in war time was considered a narrow concept" is refuted by the World War I cases, which defendants attempt to dispose of as aberrations, but which seem fully in line with historical concepts that in time of war practically the entire army is "in the field". See our brief in No. 701 on the original argument, pp. 34–37; our reply brief on the original argument, pp. 25–28; our supplemental brief on rehearing, pp. 80–82.

4. Since the historical concept of "in the field" did not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from their own civil jurisdiction, the general rationale which justifies military jurisdiction over civilians who accompany the forces in the field or into occupied territory justifies the exer-

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[40] Wiener, *A Practical Manual of Martial Law*, states (p. 136):

> The controversies here all involve interpretation of "in the field"; this phrase has been broadly construed. Thus, the mate of an army transport, a civilian cook on an army transport, a civilian superintendent in the Quartermaster Corps serving on the Mexican border, and a civilian stenographer and auditor employed in the constructing quartermaster's office at a cantonment in the United States have all been held subject to military law. In one case the civilian driver of the automobile belonging to a contractor doing construction work in a camp in the United States was held to be outside the jurisdiction of a court-martial; but this seems out of line with the next preceding decision, and in any event the case would seem to be one arising in the land forces. [Citations omitted.]

See also *Digest of Opinions of the Judge Advocate General*, 1868, p. [illegible]: "* * * the entire army, as at present mobilized and actively employed, * * *, is an army in the field".

cise of court-martial jurisdiction under Article 2 (11) over civilians who accompany the forces into territory where the United States is not sovereign. The Uniform Code of Military Justice uses the concept of "in the field"—in connection with court-martial jurisdiction over civilians—only for "time of war" (Article 2 (10)). But the *constitutional* concept, as distinguished from its present statutory usage, is not so limited, and that concept supports the validity of Article 2 (11). For that provision covers troops stationed away from American civil jurisdiction; in addition, the basic reason why these troops have been sent overseas is so that they may be placed in a military posture with respect to a possible or potential enemy.[a] Both of these factors indicate that the forces subject to Article 2 (11) are "in the field" in the constitutional sense, as it was understood when the Constitution was adopted.

D. THE CONTINENTAL CONGRESS HAD A BROAD VIEW OF THE REACH OF THE COURT-MARTIAL POWER.

The broad view of the scope of military jurisdiction, from the standpoint of opinion in the last quarter of the 18th century, also appears from the Continental Congress' law of May 19, 1786, after revolutionary hostilities had ceased, giving courts-martial jurisdiction to punish all persons, not merely soldiers, who refused to give evidence at trials by courts-martial. The decision to subject civilians to such court-martial

[a] It is not mere coincidence that both of the killings involved in these cases took place while the Korean hostilities were in progress.

jurisdiction was deliberate as shown by the Journals of the Continental Congress, v. XXX, p. 290:

> Congress took into consideration the report of a committee, consisting of Mr. [Arthur] St. Clair, Mr. [Henry] Lee and Mr. [John] Lawrance, to whom was referred a report of the Secretary of War, on the articles of War and courts Martial; and the following paragraph being under debate:
>
> > That all persons belonging to the forces of the United States, called to give evidence in any cause before a court martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court martial.
>
> A motion was made by Mr. [Charles] Pinckney, seconded by Mr. [John Bubenheim] Bayard, to strike out the words "belonging to the forces of the United States" And on the question, shall those words stand? the yeas and nays being required by Mr. [Rufus] King.
>
> * * *
>
> So the question was lost, and the words were struck out.

This particular action is highly revealing on the state of legal thinking just prior to the adoption of the Constitution. It shows that there was no rigid concept of keeping civilians entirely out of the control of the military even though the civilians had no functional connection with the military. The military necessity of getting evidence for court-martial trials was accepted as sufficient justification for the

punishment of the civilian, not by civil courts but by court-martial.[42] The statute, unimportant perhaps in itself, is significant as showing that there is no foundation in history for the thought that the power to make rules for government of the land and naval forces was so rigid that it could not be expanded to meet military exigencies.

In short, the subjection to court-martial jurisdiction of civilians accompanying the armed forces into foreign territory, where the civil power of the United States is inoperative, where military and international considerations demand control, and where only the military authorities are in a position to act, is wholly in accord with concepts of military jurisdiction prevalent at the time the Constitution was adopted and for a long period thereafter. In particular, it is not contrary to British or American tradition to subject wives accompanying their soldier husbands overseas to jurisdiction by court-martial.

In this case, Congress has selected the court-martial system and its choice must be upheld unless it be

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[42] Another instance of the Continental Congress' broad view of court-martial jurisdiction is the 1777 enactment decreeing punishment by court-martial of any person taken within 30 miles of any city in Pennsylvania, Jersey, and Delaware, which was in the hands of the enemy, who gave information or provisions to the enemy. Journals of the Continental Congress, v. IX, pp. 784–785. This statute pertains to martial law, rather than strict court-martial jurisdiction, but the enactment itself, and Washington's comments on its enforcement, indicate that the ineffectiveness of civil law was a prime factor in its adoption, and that inability of the civil tribunals to deal with these offenses moved the Congress. Washington, *Writings*, vol. 11, pp. 14–15, 258.

held to be unreasonable or arbitrary. As we have proved, that charge clearly cannot be sustained.

III

THE PRACTICAL CONSIDERATIONS ARE RELEVANT AND DEMONSTRATE BOTH THE SERIOUSNESS OF THE PROBLEM AND THE UNAVAILABILITY OF ALTERNATIVES

Defendants, from the limited view of their particular cases, dismiss briefly the practical problem of maintaining order among some 450,000 Americans overseas, Americans whose conduct determines the willingness of foreign governments to allow the presence of our military bases in their countries. We do not suggest that, as serious as these problems are, Congress could dispense with the requirements of a jury trial or an Article III court should those requirements rigidly apply to every exercise of United States jurisdiction over a civilian, no matter where he may be or what the circumstances are. But as we believe we have demonstrated (see *e. g.*, Point I, *supra*, pp. 2–23), the Constitution has no such requirement, and the practical problems are relevant in determining both what is due process and the reasonableness of court-martial jurisdiction over civilian dependents and employees overseas.

A. THERE ARE LARGE NUMBERS OF CIVILIAN EMPLOYEES AND OF DEPENDENTS WHO MUST BE ABROAD FOR THE DEFENSE OF THE COUNTRY

Since the submission of our Supplemental Brief on Rehearing, figures have become available for the number of civilians overseas as of December 31, 1956, who are military dependents, employees, or others

accompanying the armed forces. These later figures, in part based on estimates, include contractor employees and other categories not covered by the previous figures.[*] A breakdown is given in Appendix C, page 109, *infra*. The total number of persons among whom discipline is now maintained under Article 2 (11) of the Uniform Code of Military Justice is estimated at over 450,000, of whom dependents are about 415,000, and direct Government employees, contractor employees, etc., are about 38,000.

Defendants suggest that the "obvious" solution to the problem of maintaining discipline over civilian employees "is to refrain from sending such civilians overseas, and to rely solely upon uniformed personnel to do whatever work is necessary at overseas military installations" (Def. Supp. Br., p. 148). They suggest that the majority of civilian employees are clerks and stenographers who could easily be replaced by men in uniform (Def. Supp. Br., p. 146). In this, defendants are quite mistaken.

Taking their contention most broadly, and lumping together all stenographers, mechanics, guards, clerks, chauffeurs, messengers, anyone at the rate of a grade GS-5 (beginning at $3,670 and which can go as high as $4,480 per year) or under, and all persons paid by the hour, this group accounts for only 9,778 out of 23,282 direct government employees. But the direct employees are generally not the most highly skilled

[*] The largest category not previously given consists of some 5,400 employees of the Military Sea Transport Service serving on U. S. Navy ships deemed subject to military jurisdiction when military personnel are on board.

of the civilians whom defendants suggest the government can do without. There are over 4,500 contractor employees overseas and 1,635 technical representatives, highly skilled technicians and advisers whose services are indispensable to a military force which must increasingly rely on "ever-changing and ever-more complicated scientific equipment." To suggest that the most practical solution is for the United States to send these men home is to argue that the country is constitutionally precluded from using the skilled talents of those civilians who are willing to come overseas to work with the military and willing to subject themselves to its jurisdiction. It is also a recognition by the defendants that there is no other practical way in which these services can be obtained when needed by the United States overseas.

Defendants do not suggest that the *dependents* should be sent home. Nor do they in any way question the fact that to forbid families from accompanying servicemen overseas would seriously affect morale, hamper recruitment, and thereby weaken the national defense. The situation today is not essentially different from that which faced Washington when he decided that he had to keep wives in the camp "or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives." "In a word, I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion * * * some of the oldest and best Soldiers in the Service." (*Supra*, p. 34). There is no question but that in the interests of self-

defense in today's world the United States must be prepared to have some 400,000 dependents overseas living with their servicemen kin, in housing and using provisions and services made available by the United States. In short, there is no real alternative but to have large numbers of American civilians overseas, accompanying, working with, and living with the military forces.

B. BOTH EMPLOYEES AND DEPENDENTS CREATE PROBLEMS OF DISCIPLINE REQUIRING THE EXERCISE OF CRIMINAL JURISDICTION

Defendants, after suggesting that all civilian employees might be sent home, state that "in view of their infrequent occurrence" the problem of criminal acts by civilian dependents is on a par with criminal acts committed by American diplomats abroad (Def. Supp. Br., p. 153). Here too, defendants err. The magnitude of the problem, the propensity to commit offenses, and the effectiveness of administrative sanctions are all drastically different in the civilian portion of the military community.

1. The Magnitude of the Problem

As we have noted, the number of civilian dependents accompanying the military throughout the world is over 400,000. The total number of foreign service American employees outside of the United States, as of December 31, 1956, was 5,883. If one adds the entire overseas citizen staff of the United States Information Agency (1,214), that of the International Cooperation Administration (3,444), and the Department of Agriculture (154), together with their de-

pendents"; this constitutes, on a worldwide basis, a group of United States citizens equal in number to about six per cent of the military dependents alone.

The contrast between the vast number of military dependents among whom order must be maintained and the small number of people connected with our diplomatic posts is brought out even more clearly by considering particular countries such as the two here involved. In the United Kingdom, there were over 46,000 military dependents, as contrasted with some 480[44] Americans connected with the diplomatic missions. In Japan, there were over 68,000 military dependents, as contrasted with some 758[45] Americans connected with the United States missions. From the point of view of numbers alone, it is clear that the problem of administering justice within American communities numbering in the tens of thousands is not "on a par with the problem of possible criminal acts committed by American diplomats abroad" (Def. Supp. Br., p. 153).

2. Civilian dependents commit a substantial number of offenses

Since the defendants concede that military dependents are on the same constitutional footing as military

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[44] Dependents are estimated by the Department of State at 1.5 per employee, which is the rate used by the Department for budget purposes.

[45] State Department, 164; International Cooperation Administration, 9; United States Information Agency, 19; plus estimated dependents, 288.

[46] State Department, 215; International Cooperation Administration, 25; United States Information Agency, 63; plus estimated dependents, 455.

employees (Def. Supp. Br., p. 158), there would seem to be no valid conclusions which could be drawn from differences between the two groups as to the propensity to commit crimes. If it is recognized that it is as essential to the defense of the country to have technicians accompany the armed forces as it is to have service wives, then the need for criminal jurisdiction is plain. For defendants do not deny that among the employee group there are those who create a substantial problem and who commit offenses requiring punishment. And when defendants' suggestion of sending all the employees home is rejected, the only practical alternative is overseas military jurisdiction.

Nonetheless, it should be pointed out the defendants are mistaken in suggesting that "there have been very few trials of civilian dependents, and that there will never be occasion for many" (Def. Supp. Br., p. 149). During the year ending November 30, 1956, figures are available indicating the number of offenses *under foreign law* by Army civilians where jurisdiction was waived or not asserted by the foreign government. In this category, 707 were committed by employees and 417 by civilian dependents. The great bulk of these were traffic offenses, but more serious charges were also involved. There is a natural tendency to deal with dependents administratively, wherever this is possible, which cuts down the number of times court-martial jurisdiction is actually used. Non-traffic cases in which court-martial jurisdiction has been used for dependents include: assault, fraud

against the government, black market activities, drunk and disorderly in a public place, assault, tax evasion, breach of the peace, manufacture of drugs in military payment certificates, and illegal monetary transactions.

There is no question but that there is a criminal problem among the dependents overseas. It does not reach the urban crime rate in the United States (about 8 criminal homicides and 80 aggravated assaults per year per 100,000 of population)[4] but in groups as large as those here involved there does exist a problem which cannot be ignored. The military dependents as a group are totally unlike the foreign service, not only in their size but in their make up. The foreign service is carefully selected and consists in large part of those making that service a career. One serious misstep—by the foreign service officer or his family—and the career may well be ruined. On the other hand, dependents accompanying the forces overseas have obviously had no prior selection (except by the individual members of the forces). The generally accepted standards of conduct among the military community are not as strict and the consequences of getting caught are not as serious to the dependent's or to the servicemen's future.

That the crime rate among military dependents is no higher than it is, and correspondingly that their conduct creates no more problems than it does with foreign countries, reflects the very existence of the court-martial authority. Defendants express doubts as to its validity but none can doubt that, if it were

[4] F. B. I., *Uniform Crime Reports*, Vol. XXVII, No. 1 (1956), p. 7.

found invalid, black market activities by American dependents abroad, to take one example, would undergo a rapid increase.

3. Civilian dependents are treated as subject to United States jurisdiction under the NATO Status of Forces Agreement

Defendants point out that under the literal language of the NATO Agreement the foreign country has primary jurisdiction over crimes committed by American dependents which are crimes under the local law.[*] This does not affect the practical problems in any way. Nor does it alter the fact that while the foreign country may claim the right to punish a military dependent for a local crime, it nonetheless looks to the United States as the one responsible for determining such conduct in the first instance and for seeing to it that it does not happen again.

The authorities quoted in defendants' brief on this point (Def. Supp. Br. p. 152) state that they—

> have seen no case in which foreign authorities claimed or American authorities admitted any distinction between dependents and members of the force in this regard.

This accurately reflects the practical working arrangement in which the United States, as a matter of fact, is the one who takes jurisdiction over most cases involving dependents. During the year ending Novem-

[*] The United States negotiators attempted to obtain this jurisdiction but failed to win agreement because of the objection of other NATO members, six of whom, unlike the United States, were parties to the earlier Brussels Treaty Agreement of 1949 (H. M. Stationery Office Cmd. 7868) which made no provision for apportionment of jurisdiction over defendants.

ber 30, 1956, Army records show 491 cases of dependents involved in local offenses. Of these, the United States received waivers of jurisdiction in 417. Further, in those countries in which the majority of the American military dependents are located there are related or subsidiary agreements making it explicit that the United States is to exercise primary or exclusive jurisdiction over all or most categories of offenses by dependents."

4. The problem of non-American civilians working for the armed forces overseas is wholly different

Defendants point out that the Department of Defense employs some 75,000 non-American civilians in foreign countries and reimburses foreign governments for the wages of some 275,000 additional non-Americans who are employees of those governments. The contention is put forward that the existence of this group, over whom by and large[49] there is no court-martial jurisdiction, supports the argument that there is no practical problem of maintaining order among the 450,000 American nationals accompanying the

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[48] Japan (T. I. A. S. 2492 and 2848); Germany (See Senate Doc. No. 11, 84th Cong., 1st Sess.); Philippines (T. I. A. S. 1775); Netherlands (T. I. A. S. 3174); Greece (T. I. A. S. 3649); see also Leased Bases (E. A. S. 235, T. I. A. S. 2105, T. I. A. S. 2096, T. I. A. S. 2426); Korea (T. I. A. S. 2436); Greenland (T. I. A. S. 2292); Ethiopia (T. I. A. S. 2964). In the light of these published agreements, defendants' statement (Def. Supp. Br. 157) that the problem of exercising the waived jurisdiction "very obviously, has never been explored" is inexplicable.

[49] In some cases, such as in the Leased Bases, or where a foreign national accompanies the forces into a third country, the United States has court-martial jurisdiction over non-U. S. citizens.

forces overseas. But the differences between the two groups, and the reasons why the United States does not need court-martial jurisdiction over foreign local employees, are clear.

The foreign nationals are not a part of the American military contingent; they are not considered so by either government. They are subject, automatically and properly, to their own criminal and judicial system, which is in their own language and consistent with their own standards and procedures of justice. Neither the foreign government nor its people consider the United States responsible for their criminal conduct; when such conduct occurs, it does not create problems between the two governments. The foreign employees have no access to classified information and are rarely in a position to commit security offenses. They do not have the same access to supplies and provisions brought in by the United States nor do they earn foreign exchange; they do not have import or tax-free privileges—all of which lead to black-market activities. They may easily be dismissed and replaced without great inconvenience or expense since, unlike the American employees, they are largely unskilled or are workmen for whom local substitutes can readily be found, such as laborers, carpenters, electricians, drivers, mess-boys, etc. None of the considerations which require the United States to be in a position to exercise criminal jurisdiction over its own military dependents and employees brought from the United States makes it necessary to have jurisdiction over these local citizens at home in their own coun-

try. And even should it be deemed desirable to have such authority, most foreign governments would be unwilling to concede it.

C. THE ALTERNATIVES TO COURT-MARTIAL JURISDICTION SUGGESTED BY DEFENDENTS ARE EITHER INEFFECTIVE OR NOT PRACTICALLY AVAILABLE

1. The sanctions for crimes committed on bases in the United States are not available abroad.

Civilian dependents living within the United States are subject to the criminal laws of the United States and of the State and subject to the jurisdiction of both Federal and State courts. Should a civilian dependent commit murder in a State, he or she could automatically be subject to trial in an American state court. (It should be mentioned that the trial in such a court would not be subject to the grand jury, petit jury, and life-time tenure requirements of the federal Constitution.) Here again, as in the case of the foreign national being tried in his own country abroad, there is no intergovernmental problem, no international friction, no trial of a national of one country under foreign law, in a foreign language, and by unfamiliar procedures. There is likewise no question of one government's looking to another to keep its own house in order.

For lesser offenses committed on a United States base a standard practice is to refer the case to a United States commissioner designated to try petty offenses committed on a federal reservation pursuant to 18 U. S. C. 3401. The Army and Air Force have general regulations relating to this procedure. AR

22-160 (1955), AFR 110-7 (1951), AFR 110-7A (1952). The Navy also uses this procedure under regulations issued by base commanders. Under the statute, "Any person charged with a petty offense may elect, however, to be tried in the district court of the United States." 18 U. S. C. 3401 (b). The fact that this procedure functions for petty offenses committed by civilians on bases within the United States is due to the ready availability of the United States district courts and also, as a practical matter, to the fact that if an accused does not elect to be tried by a United States commissioner he frequently runs the risk of being charged with a more serious offense carrying a possible punishment of more than six months. In usual course, minor traffic offenses on the base are dealt with administratively by revoking or suspending permission to drive on the base, but the more serious ones such as reckless and drunken driving are tried by a commissioner or the district court.[30]

[30] Illustrative of the disposition of cases within the United States may be the experience at the Marine Corps Base at Camp Lejeune, North Carolina. Here, during 1956, twelve cases were referred to the United States Attorney for prosecution in the district court; 63 cases (involving, *e. g.*, drunken driving, illegal hunting, indecent exposure, possession of untaxed alcohol) were tried before the United States commissioner who visits the base once a month for such proceedings; and about 8 cases a week of minor traffic offenses were disposed of administratively by revoking or suspending the privilege of driving on the base. The Armed Forces Special Weapons Project, Sandia Base, Albuquerque, New Mexico, reported that in the last 25 months over 250 cases had been referred to federal district courts or commissioners, cases which it was decided could not be adequately handled administratively.

Thus, the problem of offenses by dependents or employees on military bases in this country can be, and is being, handled by recourse to the existing system of American civil jurisdiction, both federal and state. Court-martial jurisdiction is unnecessary to deal with the problems posed by such crimes. Abroad, the problems arising from these civilian offenses—particularly *vis-à-vis* the host government and its people—are in large part of a different order; and there is no alternative American system of justice overseas which can be utilized. As we have often pointed out, the choice is really between a foreign trial (if a local crime is also involved) and no trial at all; where no foreign offense has been committed, the Hobson's choice is no trial.[51] Neither alternative is satisfactory to Congress, which quite properly believed that the situation abroad was quite different from that in this country.

2. The experience of the United States foreign service does not provide a guide for dealing with military dependents or employees abroad.

As discussed above (*supra*, pp. 65–67), the small size of the foreign service and the highly selected calibre of its personnel make it possible to maintain order and discipline within the corps by means which are totally inadequate for dealing with the 450,000

[51] For instance, in the United States narcotics violations are violations of American law and state and federal authorities are available to provide punishment. Overseas, in many countries, a civilian accompanying the armed forces commits no crime whatsoever by dealing in narcotics unless he is subject to the Uniform Code of Military Justice.

persons who accompany the military overseas. The foreign service relies entirely on the deterrent effect of reprimand, suspension without pay for periods up to 30 days, and dismissal. A reprimand in the file of a foreign service officer may mean years of assignment at a poor post and less chance of promotion. A letter of reprimand to the wife of a soldier or to a technician may mean next to nothing. Both the United States Information Agency and the International Cooperation Administration, though without the same tradition of a career service, are in much the same position as the foreign service, and find that the similar processes of selection and similar deterrents result in a crime rate that is for all intents and purposes zero.

3. The suggested alternative of bringing all civilian defendants to the United States for trial is not practically available nor would it assure defendants a fair trial.

Defendants suggest that in the "air age" it would be a comparatively simple matter to bring all military dependents and employees who are accused of committing an offense abroad to the United States, where proceedings of a grand jury, a petit jury and a trial before a life-tenure judge could be arranged. If the time consumed in physical transportation to this country were the critical problem, the airplane might meet it, but the difficulties are on a broader plane—as we have already pointed out in our Reply Brief on the original argument, pp. 20–22, and in our Supplemental Brief on Rehearing, pp. 46–49, 59–60, 62–63. The difficulties lie in the realm of conflicting sovereignties,

competing jurisdictions, national pride, different interests, and problems of trial and proof; not the adequacy of transportation equipment. As a consequence, the practical opportunity of returning an American to this country and trying him here for a crime committed abroad is today no greater and probably less—than it has ever been.

In the first place, as discussed in our Supplemental Brief on Rehearing, pp. 54–55, the general criminal laws of the United States, with few exceptions, do not now make conduct in a foreign country a crime against United States law. Drunken driving, black market activity, assault and manslaughter in Japan, are not crimes for which an accused can be tried in the state or federal courts of this country. Should the defendants here be held to have a right to a jury trial, the United States cannot legally give them that kind of a trial. If the defendants have not violated the Uniform Code of Military Justice, they are not now subject to trial by the United States anywhere nor by any kind of a court.

Defendants say that (Def. Supp. Br., p. 154) "legislation is necessary to make her [a civilian dependent] triable in a United States court", but this proposal dismisses with a phrase the serious problems of extraterritoriality, the scope of such a statute, conflicting national interests, and double jeopardy. On these issues, we refer the Court to the discussion in our Supplemental Brief on Rehearing, at pp. 46–49. The problems referred to in that discussion are real and present. Governments (including our own) are very

loath to permit the removal, for a foreign trial, of persons who have committed an offense against the local law (particularly if the local sovereign is uncertain whether sufficient witnesses can be transported to the other country to prove the crime there). On the other hand, the nations of the world have generally accepted the concept of a foreign military trial on-the-spot for the military and those who accompany them abroad. The short of it is that, once again, it is unlikely that foreign governments would agree to the removal for trial here of civilian dependents like Mrs. Covert and Mrs. Smith, and that the alternative would be a foreign trial or none at all—or perhaps an American trial in this country only after trial and punishment in the land where the crime was committed.

Assuming, however, both a Congressional enactment covering crimes committed by Americans abroad and consent by the foreign state to removal to this country, there would still be exceedingly grave problems. As we have pointed out in our prior briefs, the very remoteness of the trial would lessen the chance of prosecution for a large number of crimes for which criminal sanctions are required. The offenses committed by military employees and dependents abroad can be broken down into four categories. At the bottom, there is a vast number of minor traffic offenses, and other minor infractions of rules such as disturbing the peace. Most of these are dealt with administratively, some by summary court-martial. It may surely be assumed that those cases would not be taken to the United States for trial.

The second category includes the serious automobile violations, such as drunken and reckless driving,

and comparable lesser crimes. Experience in all commands in this country and abroad demonstrates that such offenses require the criminal sanction of substantial fines and short jail sentences which may or may not be suspended. Numerically, these are the most common offenses by civilians which are now handled by court-martial jurisdiction overseas. Should punishment for these offenses require transferring the accused and witnesses to the United States for trial, it may be a foregone conclusion that the offenses would go unpunished. To inflict, say, a fine of $250 and a five-day sentence, few commanding officers would authorize the government to spend perhaps thousands of dollars for transportation and take two or more men away from their work for at least a week. Aside from the expense, the foreign witnesses may well not be available to come here, and they cannot be compelled to do so. The crime would go unpunished and, in a group of over 400,000, it may again be safely assumed that the consequence of lack of punishment would be an increase in crime.

The third category of offenses is comprised of the common felonies including larceny, assault, converting government property, etc., and also includes the economic crimes of black market activity and smuggling on an organized basis. Here, criminal penalties are obviously called for, but once again it is doubtful whether there would be sufficient sureness of a trial in the United States to act as an adequate deterrent. Too often, the difficulties of obtaining permission from the foreign government, arranging for wit-

nesses, and disruption of local operations would appear to outweigh the necessity of punishing the particular crime.

The final category, in which there are few cases, is that of homicides and other major crimes. For these, and for some of the felonies in the third category, attempt would no doubt be made to arrange for trial in the United States. Defendants dismiss the problem of bringing witnesses to the United States as "only talk" (Def. Supp. Br., p. 155). But conclusions as to the general problem cannot be drawn from the facts of the present cases. Two of the most common type of witnesses whose presence is required are co-conspirators and local police officials. In the case of organized smuggling or black-market activities, the co-conspirators are usually foreign citizens who have violated their own laws. Experience shows that they are unwilling to come to the United States to testify, even should their government be willing to let them out of the jurisdiction, which it frequently is not. Where local police and other officials are witnesses, there have in the past been problems in arranging to have them come to the United States. Where local citizens of the foreign country are the witnesses, they frequently decline to come so that they will not become involved. The local government, which would lend its process to make them available within the country, will not, and usually cannot, require them to go to the United States to testify.[32]

[32] In this connection, it must be remembered that the defendant would have the burden of securing and transporting witnesses, including non-Americans, unless Congress made some special provision.

Our experience of the past few years shows specifically that the assumption that foreign witnesses may be obtained whenever the United States government would like to have them is unwarranted. In the treason cases, immediately after World War II, there was a disposition among witnesses to cooperate, understandable enough in light of the fact that the United States was then the occupying power. But the government's general experience with the limited group of offenses that are now extraterritorial crimes against the United States, or with offenses in this country where foreign witnesses are needed, demonstrates that many witnesses will not come to the United States even if the government is willing to transport them. For example, in 1955, in connection with a broad investigation of passport frauds, government counsel was sent abroad with the names of fifty witnesses who, investigation had indicated, had information bearing on some 30 different cases. Twenty cases were dropped because twenty-six witnesses refused to come to the United States. In a recent tax fraud case, where two Italian witnesses had originally agreed to testify for the government, they subsequently declined to come here at the time of trial, and if is the government's view that the absence of the witnesses explains the judgment of acquittal which resulted (*United States* v. *Shahadi*, D. N. J.). In two recent cases, one in Europe and one in the Phillipines, involving bribery of federal officers, the government was unable to proceed because the key foreign witnesses refused to come to the United States.

Defense counsel usually have even greater problems than the government in obtaining evidence abroad and persuading witnesses to come to this country. In the case of *United States* v. *Powell*, now pending in the Northern District of California, the attorney for a defendant, charged with sedition, has been trying to proceed to Soviet China to take depositions of witnesses for the defense, against the judgment of the State Department that it was not in the best interests of the United States to issue a passport for such purpose. Leaving out the consideration of the particular issues in that case, it does illustrate the problems that face a defendant when he must go to trial in the United States.

Under present circumstances, only a limited number of cases arise where foreign witnesses are significant. If there is to be no on-the-spot jurisdiction by the United States over the many civilians accompanying the armed forces overseas, but trial in the United States, the problems will necessarily multiply tremendously.

In sum, the alternatives suggested by defendants are not practically available. The truth, as we have stressed, is that the only practically available alternative for most criminal offenses is trial by the foreign country under its law, against which Congress has opted with respect to persons like defendants. One further consequence of substantially increasing the number of times that persons connected with the American military are tried in foreign courts is the effect it would have both on the willingness of military and civilians to go abroad and on the political willingness of this country to maintain its military bases abroad.

It is not enough for the Executive to be satisfied that the foreign procedures are fair and just. Congress and the public must believe it. The Senate Resolution which accompanied the Senate's consent to ratification of the NATO Status of Forces Agreement,[a] indicates a basic distrust of foreign trials for Americans and suggests that the more foreign trials the greater may be the pressure to "bring the boys home", a step which this government believes would seriously weaken its national defense. In considering the reasonableness of American court-martial jurisdiction over civilians accompanying the armed forces abroad, such considerations are relevant not only for Congress but for the constitutional issues as well.

Respectfully submitted.

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FEBRUARY 1957.

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[a] P. 36, TIAS 2546. The Resolution requested the examination of the laws of foreign countries and an automatic request for waiver of foreign jurisdiction in certain cases. More extreme views have been expressed. See, e. g., H. J. Res. 177, 85th Cong., 1st Sess. (introduced by Mrs. St. George); *Task Force*, vol. 2, No. 5; Veterans of Foreign Wars Resolution No. 137 (1954).

APPENDIX A

LETTER FROM MR. WALTER HART BLUMENTHAL, AUTHOR OF THE BOOK "WOMEN CAMP FOLLOWERS OF THE AMERICAN REVOLUTION," CONCERNING MILITARY JURISDICTION OVER WOMEN CAMP-FOLLOWERS IN TIME OF PEACE IN THE PERIOD BEFORE THE AMERICAN REVOLUTION

PHILADELPHIA, *February 14, 1957.*

DEPARTMENT OF JUSTICE,
MR. ROGER FISHER,
Assistant to the Solicitor General,
Office of the Solicitor General,
Washington, D. C.

DEAR SIR: In reply to your letter of February 13, I am sending herewith a statement in summary of data and of prevailing conditions, prior to the Revolution, as requested by you.

Trusting that this information may be along the lines you desire, I am,

Sincerely yours,

WALTER HART BLUMENTHAL.

FEBRUARY 14, 1957.

That the British military forces were accompanied by women and children in peace-time prior to the beginning of the American War for Independence is seen by the presence of women and children in Jamaica with the British detachments there for more

than a century. That they had been quartered there in Jamaica is seen by the fact that, at the outbreak of the Revolution, Lord George Germain ordered a detachment from Jamaica to Virginia, consisting of 374 officers and men, forty women, and servants, followed by similar detachments (Allen French, "First Year of the American Revolution," Boston, 1934, p. 106 note.)

In all the British possessions in the West Indies, for many decades prior to the Revolution, it was customary for women and children to be quartered with or near the British troops in peace-time.

Women in peace-time were likewise with British forces in Canada following the capture of Quebec in 1763 and were quartered with the British troops stationed in Canada, prior to the Revolution. This practice prevailed also with the French in their possession of Canada prior to British conquest. As early as mid-17th century the French regiment of Carignan-Salières was accompanied by women in being sent from France for service in French Canada in peace-time occupancy.

(Note: In my book "Women Camp Followers of the American Revolution," pp. 45–51, are data concerning both peace-time and war-time women on the ration prior to the Revolution, with British colonial troops.)

Proof that women were with peace-time British colonial forces in America over protracted periods is afforded by a communication from one such woman, Martha May, dated June 4, 1758, to Colonel Henry Bouquet. Written by her (or for her) from Carlisle,

Pa., jail, where her husband was confined for misdemeanor, she wrote: "I have been a Wife 22 years and have traveled with my Husband every Place or Country the Company marcht too" * * * (Papers of Col. Henry Bouquet (1758), Pa. Historical Commission, Harrisburg, 1941, p. 78).

The fact that rations were issued uncooked to British forces in the American colonial period, and in the period of the War for Independence, and that washing of laundry, and sewing, were necessary, also nursing of the sick, made it a practice from early colonial days for women in peace-time to be on the ration with British forces in Canada (after 1763), in the British possessions of the West Indies, and elsewhere. Laxity prevailed as to the marital status of such women. Punishments were whipping or confinement for infractions of discipline. From early days, prior to the Revolution, women who were with British armed forces in British colonial possessions *were subject to court-martial jurisdiction in time of peace.* In frequent instances the records show punishment for female drunkenness, fighting, or theft, by the military authorities.

Camp women in peace-time, prior to Braddock's campaign against the French at Fort Duquesne, were numerous, and were subject to military jurisdiction. Twenty years before the Declaration of Independence, a feminine contingent was conveyed from England with Braddock's command, prior to the outset of the French and Indian War (1754–60).

An army order by Major-General Braddock, at Alexandria, April 7, 1755, read: "A greater number of Women having been brought over than those allowed by the Government sufficient for washing with a view that the Hospital might be served; and complaint being made that a concert [conspiracy] is entered into not to serve without exorbitant wages, a Return will be called for of those who shall refuse to serve for six pence per day and their Provisions that they may be turned out of camp and others got in their places" (Edward Braddock's Orderly Books, Feb. 26 to June 17, 1755, Cumberland, Md., 1880, p. 17).

Finally, from the earliest colonial settlement of Virginia by the British, women in peace-time were with British military corps, and subject to court-martial jurisdiction. The earliest Virginia colonial authorities were military, not civil, appointees of the Home British Government. Large contingents of intended brides were shipped over from English ports to Jamestown, in 1619 and thereafter. These were subject to the military authority in the colony in peace-time as well as in time of Indian hostilities.

From 1620 onward, in colonial Virginia, as also in provincial Maryland, offenses by women in peace-time were subject to the military jurisdiction of the British authorities. In the modern sense, there was then and there no civil government; the royal appointed Governor was supreme in military authority.

S/Walter Hart Blumenthal.
Walter Hart Blumenthal.

APPENDIX B

Opinions of the Judge Advocate General of 1877 indicating that at that time there was no well-established rule as to what civilians were subject to court-martial jurisdiction in time of peace. The first of these letters is found in 38 Letters Sent 557 (National Archives); the second in 38 Letters Sent 641 (National Archives). The opinions of the Attorney General which were requested in these letters appear in 16 Op. Att. Gen. 13, 48.

W.

641 of 1876

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,
April 16, 1877.

Superintendents of National Cemeteries

HON. GEO. W. MCCRARY,
Secretary of War.

Chas. H. Barth

SIR: I have the honor to return herewith the accompanying papers, referred to me from your Office, "for remarks," and to submit thereon as follows:

1. These papers relate—*first*—to the question of the amenability to military jurisdiction and trial by court martial of *Superintendents of National Cemeteries*. This question, having been brought up by the Quartermaster General, and referred to this Bureau, I had the honor to recommend, by the within endorsement of November 27th last, that the question be submitted to the Attorney General for opinion, and it was submitted accordingly on Dec. 6th

last. I had indeed no doubt myself on the question, nor had my predecessor, Judge Advocate General Holt, who, on Oct. 1873, had given an official opinion to the effect that, in view of the fact that Superintendents of Cemeteries were no part of the army, but civilians, being indeed required to be civilians by positive statute—R. S., Sec. 4874, the only law on the subject* to hold them amenable to the military jurisdiction in time of peace involved an absurdity. This is certainly my own view, it being further my opinion that the 63d Article of War† refers to, and is operative only in, (as the terms "camp" and "in the field" indicate,) a time of war, i. e. war with a foreign power, or with Indians, or a civil war; and can have no application in time of peace. Sundry other of the Articles of War are applicable only to time of war; and, as to this, or any other Article or Statute, even if it did *in express terms* assume to extend the military jurisdiction to civilians in time of peace, it would, in my opinion, necessarily be unconstitutional and of no legal effect. In my

*"The Superintendent of the national cemeteries shall be selected from meritorious and trustworthy soldiers, either commissioned or enlisted men of the volunteer or regular Army, *who have been honorably mustered out or discharged from the service of the United States*, and who may have been disabled for active field service in the line of duty."

†"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."

view, no possible case can arise, in time of peace, where a civilian can legally be made liable to military arrest and trial for a criminal or other offence, and any statute which attempts to render him so amenable must necessarily be wholly void. In time of *war* civilians serving with troops engaged in hostile operations, become, for offences committed upon the theatre of war, amenable under the 63d Article above cited, and indeed independently of it, to the Military jurisdiction. So, during the prevalence of Martial law or Military government, (See Opinion of Chase, C. J., in *In re* Milligan, 4 Wall. 142,) civilians may be made so amenable in particular cases, though here the exceptional jurisdiction can properly be enforced only with great delicacy and caution. But except in these instances, such a jurisdiction cannot be exercised without, in my judgment, the clearest violation of the Constitution; and to exercise it in fact would be an act of arbitrary power wholly repugnant to the principles upon which our system of government is based.

So obvious to my mind is all this, that, (in view of the terms of Sec. 4874 of the Revised Statutes, in regard to Superintendents of National Cemeteries,) I should never have thought of recommending the reference of the question of their amenability to military trial, to the Attorney General, had it not been for the recent opinion (contained with the accompanying papers) of that official in, (or rather relating to, for the opinion was in terms general,) the

case of *Barth*, to which the other papers, herewith returned, refer. It was the existence of this opinion alone that induced such recommendation, and it is the fact alone that it still exists which induces the request with which this communication concludes.

2. *Chas. H. Barth* was a quartermaster's clerk, employed by Lieut. Col. A. R. Eddy, Depty. Quartermaster General, and chief quartermaster of the military Department of California, stationed at San Francisco. Barth was not an officer of the army nor an enlisted man, but a civilian clerk paid out of the annual appropriation for the quartermasters department of the Army. Employed at San Francisco, in time of peace, his *status* was precisely that of any civilian clerk employed at the present time in the War Department at Washington; his only relation to the military service being that he performed labor for the United States in the military branch of the executive department of the government. Barth, having been detected in the forgery of the name of a civilian contractor on checks issued to his order by the United States, through Lieut. Col. Eddy, and in the utterance of these checks when forged, by selling them to a money broker in San Francisco and getting the money upon them, (as also of the falsification of official papers in violation of Sec. 5438, Rev. Stats.,) was (illegally as I hold,) placed in *military arrest* by the order of the Department Commander, General Schofield, and the question was thereupon raised by him whether

Barth could legally be tried by a court martial. This Bureau gave its opinion unhesitatingly in the negative, but General Schofield, who took a contrary view, having induced the question to be referred by the Secretary of War to Attorney General Taft, that official, on June 2, 1876, rendered a very brief opinion in which he concurred in the view of Genl. Schofield. This opinion, which in effect held all the clerks—male and female—of the War Department subject to the military jurisdiction and to trial by court martial, and the principle of which was indeed to hold the Secretary of War, whose relation to the "land forces" is of the most intimate character, as also the President who is commander in chief of the Army, similarly amenable, appeared to me so extraordinary, that, believing it to have been issued through some oversight, I informally requested the Attorney General to reconsider the question passed upon. This he readily consented to do, and—as I have been informed—had done so in part, when he went out of office. His opinion, therefore, of June 2, 1876, remains unrevoked.

[It may be noted here that Barth escaped from the military arrest, and has since been at large. The State Department has recently been requested by the Secretary of War to procure his extradition from the Hawaiian government.]

3. In view of the facts thus detailed, I have the honor to request, and, in view of the importance of the question of constitu-

tional law involved, to urge, that the Secretary of War will renew the reference to the Department of Justice of the question of the amenability to the military jurisdiction of Superintendents of National Cemeteries, originally submitted by the Hon. Secretary to the Attorney General on Dec. 6th last, but on which no opinion has yet been given: And further that he will request at the same time a review of the opinion relating to the case of Barth, and a further opinion therein, in case it should be deemed proper to withdraw the existing one.

By a reference to Secretary Cameron's said communication to the Attorney General of Dec. 6, 1876, it will be seen that he requested in substance that the two cases should be considered together, and an opinion be furnished upon both, in connection and at the same time.

A brief memorandum of authorities upon the question of jurisdiction above indicated is herewith furnished; as also Remarks upon the Argument of Genl. Schofield in the case of Barth.

I have the honor to remain
Very respectfully
Your obt. svt.,
W. M. DUNN,
Judge Advocate General.

MEMO. OF AUTHORITIES

"Under the Constitution of the U. S., (See Amendments—Arts. V & VI,) Con-

gress has no power to subject any citizen of a state to trial and punishment by military power in time of peace." Atty. Gen. Hoar) XIII Opinions of Attys. Gen. 63.

In XIV. Opinions, 22–24, Atty. Gen. Williams construes the 63d (then numbered the 60th) Article of War as referring to a time and theatre of war, and holds civil employees serving with the troops in an Indian war, amenable to the military jurisdiction, under this Article. The inference is that employees not so serving, (but serving in time of general peace, and—even if Indian hostilities were going on at the time—at a place not in the "field" but wholly remote from the theatre of any hostilities,) cannot legally be made so amenable.

In Stuart *v.* United States, 18 Wallace, 84, 88, it is held that a contractor for transportation of military stores from post to post "remote from the seat of actual war," was not performing a military service, and was no part of the Army. (And see reference to this case in 10 Ct. of Claims, 419.)

The only adjudicated case known to me in which the jurisdiction of a military court over a civilian clerk or employee is sustained, is that of *Matter of John Thomas*, U. S. Dist. Ct. for the Southern Dist. of Mississippi, 1 Chicago Legal News, 245. Thomas was a clerk to an Army paymaster. I think, of course that the ruling holding him amenable to trial by court martial was entirely unsound, but I believe that it was in a considerable degree in-

fluenced by the fact that Mississippi was at the time under a military government, under the Reconstruction Laws, and the party was viewed thus—erroneously as I think—as practically serving in the field.

[The ruling in U. S. v. Bogart, 3 Benedict, 257, proceeded on the view that a paymaster's clerk in the *Navy* was a regular uniformed officer of the Navy, having rank as such, &c., and thus not a civilian at all. This case is therefore not in point.]*

In General Schofield's argument he refers to the phraseology of the present 60th Article of War—"any person in the Military service of the United States," as if it extended the military jurisdiction to persons other than officers and enlisted men. In my opinion, this phrase is simply to be regarded as a condensed form of expression for the phrase employed in the original Act, (Mch. 2, 1863, ch. 67, sec 1.)—"any person in the land (or naval) forces of the United States, or in the militia in actual service of the United States in time of war." By these words Congress clearly intended the officers and

*If it be held that Barth is or was amenable to military jurisdiction and trial, then every clerk in the War Department at Washington, male or female, is so amenable: the same may also be, with equal reason, held of the Secretary of War, whose relations to the land forces are closer than can be those of any clerk in Quartermaster or any other branch of his Department; and may be held also of the President who is commander in chief of the Army!

soldiers of the army (including militia when regularly called into the United States service,) and the officers and seamen of the navy. The Commission on the Revision of the Statutes were not authorized to change the existing law, but they could condense and simplify, and, in my opinion, this is all that they have done in the present 60th Article; the term now employed being merely a brief form of the more elaborate form, but each being simply a description of the purely military force of the United States, composed of officers and enlisted men. A similar condensation of expression occurs in the corresponding Article of the Naval Code.

I am—further—wholly unable to perceive the bearing, upon the present question, of the "or other person," etc., cited by General Schofield from the clause before the last of the 60th Article. I construe this as making punishable officers or soldiers who may purchase, etc., the articles mentioned from other officers or soldiers, or from any of the class of civil persons commonly employed in connection with armies, as teamsters, officers servants, camp-followers, etc. I consider the provision to have no more significance in referance to the question at issue than if, instead of the expression, "or other person," etc., the Article had said—*or from any civilian.* To illustrate: Suppose an Act of Congress should provide that if a soldier committed an assault upon a citizen of the United States, he should be tried by court martial, and punished in

a certain way. In my opinion there would be just as much reason for holding that under this Act the citizen could be tried by court martial and punished as prescribed for committing an assault upon the soldier, as for holding that the clause indicated of the 60th Article furnishes any color of authority for the trial by court martial of a civilian clerk situated as was Barth.

I cannot therefore perceive that the Revised Statutes make any change whatever in the law as to the particular under consideration. But even if they did; even if in a hundred Articles or provisions they in terms authorized the trial of civilians by court martial, such a trial would still be utterly illegal because in contravention of the letter and spirit of the Constitution. The question is thus a constitutional, not a statutory one. At the same time I am unable to discover in the Statutes any attempt whatever to contravene the Constitution in this respect.

W. M. DUNN,
Judge Advocate General.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,
June 16, 1877.

HON. GEO. W. McCRARY,
Secretary of War.

SIR: I have the honor to return herewith the papers referred to this Bureau in the case of Wm. G. Crafts, and to express the

opinion that such case is not within the jurisdiction of a court martial, and that the prisoner is entitled to be immediately released by the military authorities, or committed to the custody of the U. S. Marshal.

This Bureau has always been of opinion that the military jurisdiction cannot legally be extended to a case of a civilian except upon the rare and extraordinary occasion of a state of war or of the existence of martial law, and then only for crimes committed upon the theatre of war or within the scope of such law. The 63d Article of War is deemed to recognize this principle, in providing that retainers to the *Camp* and persons serving with the *armies in the field*, though not enlisted soldiers, shall be subject to military law; thus evidently limiting such amenability to civil persons serving with troops engaged in actual war, and for offences committed upon its theatre.

The within named civilian, Wm. G. Crafts, was, at the time of his offences, not serving with an army in the field, but was a clerk to an officer acting as quartermaster stationed at a military post, within the limits, not of a Territory but of a State—Nebraska. This post is designated "Camp Robinson," but it is not a camp in a warlike sense, but a permanent station, having been established for at least three years. The locality of the post was not within the theatre of an Indian war; nor were the troops at or near the post engaged

in war. The Indians at Red Cloud Agency, near by, were not at war with the United States.

The statement in the papers relied upon as giving the court martial jurisdiction is that—"the troops stationed at that post were "operating 'in the field' in the immediate presence of various bands of "Indians, many of whom were lately from the war path." This statement is a mixture of inference with fact. While it is no doubt true that some of the Indians at the Agency had recently been in hostility with the United States, it is a conclusion only of the writer that the troops stationed at the post were "operating in the field." But if indeed "operating," in the restricted sense of guarding the frontier and holding themselves in readiness to repell any disorder at the Agency, or to march against inimical Indians in the event of war or active hostilities, they were not, in the opinion of this Bureau, so engaged in actual warfare as to authorize courts martial convened at their station to take cognizance of offences committed by civilians there commorant.

It is to be remarked that not only is the right of a civilian to be tried by the civil courts one which cannot constitutionally be infringed upon except under circumstances most clearly and indubitably subjecting him to military law and government, but the theatre of an Indian war is necessarily peculiarly limited, being confined to the locality of the particular tribe or tribes at

war with the United States. The military jurisdiction in a case like the present, is thus to be more cautiously extended than in the case of a general war.

It is further to be observed that even if the jurisdiction of a court martial could legally have been stretched so as to include this case at the date of the alleged offences, March 31, it would be too late to exercise such a jurisdiction now when hostilities with Indians within the Department of the Platee have almost ceased, and a state of war can scarcely be said to exist there except so far as relates to certain distant roving bands. The jurisdiction of a court martial under the 63d Article can, it is held, be exercised only pending the war, during and upon the scene of which the offence was committed.

It is thus the opinion of this Bureau that no sufficient authority is shown for subjecting the civilian named to the exceptional jurisdiction of a military court. His offences—conspiring with contractors, &c, to defraud the United States—were not military ones, but such as are clearly cognizable, under Sec. 5438, Revised Statutes, by the U. S. District Court, which meets at Omaha, (the entire State of Nebraska being included within the judicial district,) on October 10th next. The recommendation of this Bureau would therefore be that the papers in the case be transmitted to the Department of Justice, with the request that the necessary instructions be given for

the arrest of the prisoner by the Marshal and his prosecution before said Court.

In view however of the opinion of Attorney General Taft in the case of Barth, of June 2d, 1876, which the Judge Advocate General, believing it to have been inadvertently issued, has heretofore desired the Secretary of War to ask to have reconsidered, it is urged that the Hon. Attorney General be requested to furnish the Secretary of War with an opinion as to whether a court martial may legally assume jurisdiction of the case of the within named civilian clerk, Wm. G. Crafts.

W. M. DUNN,
Judge Advocate General.

APPENDIX C

U. S. CITIZENS WORKING FOR AND WITH THE DEPARTMENT OF DEFENSE IN FOREIGN COUNTRIES

(Excluding Territories and Possessions)
As of 31 December 1956

(Estimated)

SUMMARY

Total	1,186,445
Military	731,623
Civilian	454,822
Civilian Components	(37,971)
Dependents	(416,851)

Detail

	Number	Number of dependents
U. S. Military Personnel	[1] 731,623	395,413
DOD[a] Civilian Employees	[2] 23,282	[3] 17,447
Technical Representatives (Highly Skilled)	1,635	[4] 700
Contractors' Employees	[5] 4,500	[5] 2,000
USO Employees	25	25
American Red Cross	664	66
Army-Air Force Exchange & Motion Picture Service	2,006	[5] 1,000
Military Sea Transport Service	[5] 5,400	—
Special Services	459	[5] 200

[a] Department of Defense.
[1] Includes 112,156 afloat.
[2] 31 January 1956 figure.
[3] Afloat.
[4] Estimated from existing ratios.
[5] Plus others—unknown.

APPENDIX D

Delegates With Military Experience Who Participated in the Constitutional Convention of 1787 (35 Out of 55)

New Hampshire

John Langdon. Captain of militia.
Nicholas Gilman. Captain.

Massachusetts

Rufus King. Aide to Gen. Glover.

New York

Alexander Hamilton. Aide-de-Camp to Washington. Lt. Colonel.

New Jersey

William Livingston. Appointed brigadier-general of New Jersey militia, 1776.
David Brearly. Lt. Colonel. Served after war as colonel of militia.
William Paterson. "He was an officer in the Somerset County Battalion of minute men * * * ".
Jonathan Dayton. Captain at Yorktown.

Pennsylvania

Thomas Mifflin. Washington's aide-de-camp and quartermaster-general of the Continental Army.

George Clymer. Captain of volunteers in Gen. Cadwalader's brigade.

Thomas Fitzsimons. "Raised and commanded a company of militia."

James Wilson. Elected Colonel of 4th battalion of Cumberland County associations, May 3, 1775. Never in active service. May, 1782, became brigadier-general of militia.

Delaware

Gunning Bedford, Jr. Aide to Gen. Washington. (Not confirmed in the records, but stated by daughter in her will.) (Rank not given.)

John Dickinson. "Temporarily he appears to have served as a private in a special force raised in that colony (Delaware) which took part in the battle of Brandwine." Later commissioned a brigadier-general of Delaware militia.

Richard Bassett. "Captain of a troop of Dover Light Horse."

Maryland

James McHenry. Surgeon of Col. Robert Magaw's 5th Pennsylvania Battalion. Later "Senior surgeon of the Flying Hospital, Valley Forge." Secretary to Washington.

Virginia

George Washington. General Commander-in-Chief of Continental Army.

North Carolina

William Blount. Paymaster. No rank given.

Richard D. Spaight. Aide to Gen. Richard Caswell, Commanding the state militia. No rank given.

Hugh Williamson. Surgeon General of North Carolina state troops.

South Carolina

Charles C. Pinckney. Aide to Washington. Brigadier-general.

Charles Pinckney. Lieutenant of the Charlestown (Charleston), S. C., Regiment of militia.

Pierce Butler. Major of N. M. 29th Reg. (Ireland). Resigned 1773. (Adj.-Gen., S. C., 1779.)

Georgia

William Few. Lt. Colonel.

Abraham Baldwin. Chaplain. No rank given.

Sources: *Dictionary of American Biography, National Cyclopaedia of American Biography.*

MILITARY PARTICIPATION IN THE AMERICAN REVOLUTION BY DELEGATES TO THE CONSTITUTIONAL CONVENTION OF 1787 WHO DID NOT SIGN THE CONSTITUTION

New York

John Lansing. Military secretary to General Philip Schuyler, 1776–1777.

New Jersey

William C. Houston. Captain of the foot militia of Somerset County, N. J.

Maryland

John Francis Mercer. Lt. Colonel.

Virginia

Edmund Randolph. Appointed aide-de-camp by Washington in August, 1775. Returned to Williamsburg in 1776.

George Wythe. Volunteered for army when hostilities began, but almost immediately, sent to Congress.

James McClurg. Surgeon in Virginia militia. Referred to frequently in the records as physician-general and director of hospitals for the state.

North Carolina

Alexander Martin. Colonel.

William R. Davie. Commissary-General.

Georgia

William Leigh Pierce. Aide-de-camp to General Greene. Left the army as a brevet major in 1783.

John Houstonn. As governor of Georgia, he personally commanded a force of 350 Georgia militiamen in a military effort against St. Augustine, Florida. Expedition failed.

Source: *Dictionary of American Biography.*